FILE COPY

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1960

No. 72

PAUL JOHN CARBO, PETITIONER,

vs.

UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 20, 1960
CERTIORARI GRANTED MAY 31, 1960

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. 72

PAUL JOHN CARBO, PETITIONER,

vs.

UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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[fol. 2] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

No. 27973 CD

UNITED STATES OF AMERICA, Plaintiff,

v.

PAUL JOHN CARBO, aka John Paul Carbo, Frankie Carbo; FRANK PALERMO, aka Blinky Palermo; JOSEPH SICA; LOUIS TOM DRAGNA; TRUMAN GIBSON, JR., Defendants.

INDICTMENT—Filed September 22, 1959

(U.S.C., Title 18, Sections:

1951—Conspiracy to Violate Anti-Racketeering Act;
875(b)—Interstate Communications-Extortion;
371—Conspiracy)

The grand jury charges:

Count One

(U.S.C., Title 18, Sec. 1951)

1. Prior to October 22, 1958, the exact date being unknown to the grand jury, and continuing to the date of this indictment, defendants Paul John Carbo, aka Frankie Carbo, Frank Palermo, aka Blinky Palermo, Joseph Sica, Louis Tom Dragna, Truman Gibson, Jr., unindicted co-conspirator William Daly, and divers other persons to your grand jury unknown, did agree, confederate and conspire to commit offenses against the United States as follows:

2. Willfully to obstruct, delay and affect interstate commerce by means of extortion, in violation of United States Code Title 18, Section 1951.

3. The objects of such conspiracy were to be accom-
[fol. 3] plished as follows:

a. The defendants Paul John Carbo and Frank Palermo, by use of threats of physical harm and violence and threats of economic loss and injury to the victims Donald Paul Nesseth and Leonard Blakely, aka Jackie Leonard, were to obtain monies representing a share of the purses earned by a professional prize fighter then engaged in championship matches being nationally televised, to wit, Donald Jordan, and to obtain control of the professional activities of the same Don Jordan by naming the opponents whom he would fight and also the places where and conditions under which he would engage in such boxing matches.

b. The defendants Paul John Carbo and Frank Palermo intended to obtain said monies and control by and with the consent of the victims Donald Paul Nesseth and Leonard Blakely without paying any consideration for the monies and control so received.

c. It was a further part of said conspiracy that defendants would enlist the services of persons known to the said victims to have underworld reputations and to possess the necessary power to execute the conspirators' demands by force and violence; and, for that purpose did enlist Joseph Sica and Louis Tom Dragna who were to personally contact Leonard Blakely and Donald Paul Nesseth and obtain their agreement to the conspirators' said demands.

d. It was an essential part of the conspiracy that defendant Truman Gibson, Jr., who was an officer of the International Boxing Club, Inc., and the National Boxing Enterprises, Inc., a major promoter of nationally televised prize fights, and an influential figure in other business associations, would use his power and authority to persuade victims Donald Paul Nesseth [fol. 4] and Leonard Blakely to accede to the demands of the conspirators for control of the prize fighter Don Jordan.

4. To effect the objects of said conspiracy the defendants committed divers overt acts in Los Angeles County,

California, within the Central Division of the Southern District of California, and in other places, as follows:

a. On or about October 23, 1958, defendant Frank Palermo had a conversation by telephone with Leonard Blakely.

b. On or about October 24, 1958, defendant Truman Gibson, Jr., had a conversation with Leonard Blakely, Donald Paul Nesseth and Jackie McCoy.

c. On or about December 30, 1958, defendant Frank Palermo had a telephone conversation with Leonard Blakely.

d. On or about January 5, 1959, defendant Frank Palermo had a conversation with Leonard Blakely.

e. On or about January 5, 1959, defendant Paul John Carbo had a conversation with Leonard Blakely.

f. On or about January 27, 1959, defendant Frank Palermo had a telephone conversation with Leonard Blakely.

g. On or about January 27, 1959, defendant Paul John Carbo had a telephone conversation with Leonard Blakely.

h. On or about April 22, 1959, defendant Frank Palermo had a telephone conversation with Leonard Blakely.

i. On or about April 25, 1959, defendant Frank Palermo had a conversation with Donald Paul Nesseth in St. Louis, Missouri.

j. On or about April 25, 1959, defendant Frank Palermo had a telephone conversation with Leonard Blakely.

k. On or about April 25, 1959, defendant Frank Palermo had a conversation with Sam Muchnick in St. Louis, Missouri.

l. On or about April 28, 1959, defendant Paul John Carbo had a telephone conversation with Leonard Blakely.

[fol. 5] m. On or about April 28, 1959, defendant Frank Palermo had a telephone conversation with Leonard Blakely.

n. On or about May 3, 1959, defendant Frank Palermo had a telephone conversation with Leonard Blakely.

o. On or about May 4, 1959, defendant Joseph Sica had a telephone conversation with Leonard Blakely.

p. On or about May 5, 1959, defendants Frank Palermo and Louis Tom Dragna visited the Hollywood American Legion Stadium where Donald Paul Nesseth and Leonard Blakely were present.

q. On or about May 6, 1959, defendants Joseph Sica and Frank Palermo had a conversation with Leonard Blakely, Donald Paul Nesseth and Jackie McCoy.

r. On or about May 6, 1959, Joseph Sica had a telephone conversation with Manuel Dros.

s. On or about May 7, 1959, defendant Truman Gibson, Jr., had a telephone conversation with Leonard Blakely.

t. On or about May 11, 1959, defendant Truman Gibson, Jr., had a telephone conversation with Leonard Blakely.

u. On or about May 14, 1959, co-conspirator William Daly had a conversation with Leonard Blakely.

[fol. 6]

Count Two

(U.S.C., Title 18, Sec. 1951)

1. On or about January 27, 1959, at Los Angeles, State of California, in the Central Division of the Southern District of California and within the jurisdiction of this court, Frank Palermo, a defendant herein, did knowingly, will-

fully and feloniously obstruct, delay and affect commerce, as that term is defined in Section 1951 of Title 18, United States Code, by extortion (as defined in the said Section of the United States Code), that is to say, defendant Frank Palermo did obtain property to the value of $1,725.00 in the form of a personal check from Leonard Blakely, by the wrongful use of force and fear, in that said defendant did threaten Leonard Blakely with physical injury and violence unless Leonard Blakely paid defendant Frank Palermo the said sum.

2. Contrary to the terms and provisions of Section 1951 of Title 18, United States Code.

[fol. 7]

Count Three

(U.S.C., Title 18, Sec. 1951)

1. On or about January 27, 1959, at Los Angeles, State of California, in the Central Division of the Southern District of California and within the jurisdiction of this court, Paul John Carbo, a defendant herein, did knowingly, willfully and feloniously obstruct, delay and affect commerce, as that term is defined in Section 1951 of Title 18, United States Code, and did attempt to do so by extortion (as defined in the said Section of the United States Code), that is to say, defendant Paul John Carbo attempted to obtain property to the value of $1,725.00 in the form of money from Leonard Blakely, by the wrongful use of force and fear, in that said defendant did threaten Leonard Blakely with physical injury and violence unless Leonard Blakely paid defendant Frank Palermo the said amount of money.

2. Contrary to the terms and provisions of Section 1951 of Title 18, United States Code.

[fol. 8]

Count Four

(U.S.C., Title 18, Sec. 1951)

1. On or about May 6, 1959, Frank Palermo and Joseph Sica, defendants herein, did knowingly, willfully and feloniously obstruct, delay and affect commerce, as that term

is defined in Section 1951 of Title 18, United States Code, and did attempt to do so by extortion (as defined in the said Section of the United States Code), that is to say, the defendants Frank Palermo and Joseph Sica attempted to coerce Donald Paul Nesseth into giving up a part of his contractual right to control the professional boxing activities of welterweight champion Don Jordan by signing a match between Don Jordan and Al "Sugar" Hart contrary to the wishes and desires of Donald Paul Nesseth, through the wrongful use of force and fear.

2. Contrary to the terms and provisions of Section 1951 of Title 18, United States Code.

[fol. 9] Count Five

(U.S.C., Title 18, Sec. 371, 875(b))

1. Prior to October 22, 1958, the exact date being unknown to the grand jury, and continuing to the date of this indictment, defendants Paul John Carbo, aka Frankie Carbo, Frank Palermo, aka Blinky Palermo, Joseph Sica, Louis Tom Dragna, Truman Gibson, Jr., unindicted co-conspirator William Daly, and divers other persons to your grand jury unknown, did agree, confederate and conspire to commit offenses against the United States as follows:

2. Willfully and with intent to extort money and a thing of value, to wit, a share of the management of the prize fighter Don Jordan, from Leonard Blakely and Donald Paul Nesseth, to transmit in interstate commerce communications containing threats to injure the persons of Donald Paul Nesseth and Leonard Blakely in violation of Title 18, United States Code, Sections 371 and 875(b).

3. The objects of said conspiracy were to be accomplished as follows:

a. The defendants Paul John Carbo and Frank Palermo were to transmit interstate telephone communications containing threats of physical harm and violence and threats of economic loss and injury to victims Donald Paul Nesseth and Leonard Blakely, aka Jackie

Leonard, in an effort to obtain monies representing a share of the purses earned by a professional prize fighter then engaged in championship matches being nationally televised, to wit, Donald Jordan, and control of the professional activities of the same Don Jordan by naming the opponents whom he would fight and also the places where and conditions under which he would engage in such boxing matches.

b. The defendants Paul John Carbo and Frank Palermo intended to obtain said monies and control by and with the consent of victims Donald Paul Nesseth [fol. 10] and Leonard Blakely without payment of consideration for the monies and control so received.

c. It was a further part of said conspiracy that defendants would enlist the services of persons known to the said victims to have underworld reputations and to possess the necessary power to execute the conspirators' demands by force and violence and, for that purpose did enlist Joseph Sica and Louis Tom Dragna who were to personally contact Leonard Blakely and Donald Paul Nesseth and obtain their agreement to the conspirators' said demands.

d. It was an essential part of the conspiracy that defendant Truman Gibson, Jr., who was an officer of the International Boxing Club, Inc., and the National Boxing Enterprises, Inc., a major promoter of nationally televised prize fights, and an influential figure in other business associations, would use his power and authority to persuade victims Donald Paul Nesseth and Leonard Blakely to accede to the demands of the conspirators for control of the prize fighter Don Jordan.

4. To effect the objects of said conspiracy the defendants committed divers overt acts in Los Angeles County, California, within the Central Division of the Southern District of California and in other places, among which are the following:

a. On or about January 27, 1959, defendant Frank Palermo had a telephone conversation with Leonard Blakely.

b. On or about January 27, 1959, defendant Paul John Carbo had a telephone conversation with Leonard Blakely.

c. On or about April 28, 1959, defendant Paul John Carbo had a telephone conversation with Leonard Blakely.

d. On or about April 28, 1959, defendant Frank Palermo had a telephone conversation with Leonard Blakely.

e. On or about April 29, 1959, defendant Frank [fol. 11] Palermo had a telephone conversation with Leonard Blakely.

[fol. 12] Count Six

(U.S.C., Title 18, Sec. 875(b))

1. On or about January 27, 1959, defendant Frank Palermo, with intent to extort money and a thing of value, to wit, a share of the management of welterweight boxing champion Don Jordan, did transmit in interstate commerce a communication containing a threat to injure the person of Leonard Blakely, in violation of Title 18, United States Code, Section 875(b).

[fol. 13] Count Seven

(U.S.C., Title 18, Sec. 875(b))

1. On or about January 27, 1959, defendant Paul John Carbo, with intent to extort money and a thing of value, to wit, a share of the management of welterweight boxing champion Don Jordan, did transmit in interstate commerce a communication containing a threat to injure the person of Leonard Blakely, in violation of Title 18, United States Code, Section 875(b).

[fol. 14] Count Eight

(U.S.C., Title 18, Sec. 875(b))

1. On or about April 28, 1959, defendant Frank Palermo, with intent to extort money and a thing of value, to wit, a share of the management of welterweight boxing champion Don Jordan, did transmit in interstate commerce a communication containing a threat to injure the persons of Leonard Blakely and Donald Paul Nesseth, in violation of Title 18, United States Code, Section 875(b)).

[fol. 15] Count Nine

(U.S.C., Title 18, Sec. 875(b))

1. On or about April 28, 1959, defendant Paul John Carbo, with intent to extort money and a thing of value, to wit, a share of the management of welterweight boxing champion Don Jordan, did transmit in interstate commerce a communication containing a threat to injure the persons of Leonard Blakely and Donald Paul Nesseth, in violation of Title 18, United States Code, Section 875(b)).

[fol. 16] Count Ten

(U.S.C., Title 18, Sec. 875(b))

1. On or about April 29, 1959, defendant Frank Palermo, with intent to extort money and a thing of value, to wit, a share of the management of welterweight boxing champion Don Jordan, did transmit in interstate commerce a communication containing a threat to injure the persons of Leonard Blakely and Donald Paul Nesseth, in violation of Title 18, United States Code, Section 875(b)).

A True Bill

Axel C. Johnson, Foreman.

Laughlin E. Waters, United States Attorney.

[fol. 18]

IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

PROCEEDINGS ON ARRAIGNMENT AND PLEA—December 2, 1959

Minutes of the Court
Date: Dec. 2, 1959,
At: Los Angeles, Calif.

No. 27,973 Criminal

U.S.A.

PAUL JOHN CARBO (Cts 1, 3, 5, 7, 9)
aka FRANKIE CARBO (Age 55)

Present: Hon. Ernest A. Tolin, District Judge; Deputy Clerk: W. E. Payne; Reporter: Virginia Wright; U. S. Att'y, by Assistant U. S. Att'y General: Lloyd F. Dunn; Counsel for Defendant: no appearance

Defendant present (in custody)

Proceedings: For arraignment and plea of Defendant Carbo only.

Defendant Carbo is arraigned and states his true name is Paul John Carbo, and that he is fifty-five years of age.

Defendant states he will obtain counsel.

Court directs the U. S. Marshal to permit Defendant Carbo to use the telephone for the purpose of calling counsel.

Defendant states he has posted a $100,000. bond.

Court Orders case continued to Dec. 8, 1959, 9:30 AM, for plea of Defendant Carbo and Court states that said date may be advanced if defendant so desires.

John A. Childress, Clerk, By Wayne E. Payne, Deputy Clerk.

T-12/2/59.

[fol. 19]

IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

PROCEEDINGS ON ARRAIGNMENT AND PLEA—December 8, 1959

Minutes of the Court
Date: Dec. 8, 1959,
At: Los Angeles, Calif.

No. 27,973 Criminal

U.S.A.

vs.

PAUL JOHN CARBO, aka JOHN PAUL CARBO, aka FRANKIE CARBO, (Cts 1, 3, 5, 7, 9)

Present: Hon. Ernest A. Tolin, District Judge; Deputy Clerk: W. E. Payne; Reporter: Virginia Wright; U. S. Att'y, Laughlin E. Walters; Counsel for Defendant no appearance.

Defendant present (in custody)

Proceedings: For plea of Defendant Carbo.

Defendant appears without counsel and requests permission to enter his plea and be permitted to return to New York and obtain counsel there and return here for the trial.

Defendant Carbo pleads not guilty to counts 1, 3, 5, 7, and 9 of the Indictment.

Court Orders cause as to Defendant Carbo set for trial with co-defendants on March 29, 1960, 9:30 AM, and directs that Defendant Carbo be returned to New York for the purpose of obtaining counsel and be returned here in time for trial.

John A. Childress, Clerk, By Wayne E. Payne, Deputy Clerk.

T-12/8/59.

[fol. 20]

IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION
No. 27973-CD

UNITED STATES OF AMERICA, Plaintiff,

v.

PAUL JOHN CARBO, et al., Defendants.

MOTION TO QUASH WRIT OF HABEAS CORPUS AD PROSEQUENDUM—Filed March 14, 1960

The defendant, Paul John Carbo, moves the above entitled Court for an order quashing the Writ of Habeas Corpus ad Prosequendum issued herein.

The ground of said motion is that this Court has no jurisdiction, and/or has exceeded its jurisdiction in issuing said Writ.

The defendant will rely upon the files and records herein, the affidavit of William B. Beirne, filed concurrently herewith and the Points and Authorities attached hereto.

William B. Beirne, A. L. Wirin, Attorneys for Defendant Paul John Carbo.

[fol. 21]

AFFIDAVIT OF WILLIAM B. BEIRNE IN SUPPORT OF MOTION TO QUASH WRIT OF HABEAS CORPUS AD PROSEQUENDUM

State of California)
County of Los Angeles) ss

William B. Beirne, being first duly sworn, deposes and says:

That he is the attorney of record for Paul John Carbo, one of the defendants in the above-entitled action.

That affiant is informed and believes and on such information and belief alleges that said defendant is now and for some months past has been confined in the prison ward of Bellevue Hospital in New York City, New York, as a prisoner of the State of New York following a conviction of a misdemeanor in that State; that on or about the 3d day of March, last, affiant visited said defendant in said ward and on that occasion talked with a Dr. Hummell, a physician attached to said hospital; that Dr. Hummell informed affiant that he had been attending said defendant since the latter's confinement in said hospital as a patient; that said defendant was then and for some time theretofore had been suffering from a severe kidney infection which required constant treatment; that it is necessary to give said defendant certain medication four times a day at certain definite times and that it is also necessary that defendant be given urine tests four times a day; that if the defendant were to be sent to Los Angeles for trial there it would be imperative that he be transported there in the shortest possible time, and that upon arrival in Los Angeles and during his stay there, it would be necessary that he be given the kind of medical care which he was then receiving and in a hospital equipped for that purpose; that since the defendant was a patient under the care of the Bellevue Hospital the hospital and the doctors attending said defendant had a responsibility for his health and well-being; [fol. 22] and the doctor was of the opinion that unless the defendant continued to receive the treatment that he was then receiving for the ailment from which he is suffering, his life might be endangered; that affiant has requested said doctor to prepare and forward to affiant a letter setting forth said defendant's physical condition, the treatment to be given said defendant for the ailment from which he is suffering, and the doctor's prognosis of the case; that affiant has been informed and believes, and upon said information and belief avers that said letter has been forwarded to affiant.

That on the evening of March 11th, last, affiant talked from Los Angeles over the telephone with Mrs. Carbo, the wife of the defendant, in New York City; that Mrs. Carbo informed affiant that she had talked with Dr. Hummell the

day before, and was informed by him that the defendant's temperature on the two previous nights had been as high as 105 degrees, but that during the day it had lowered.

William B. Beirne

Subscribed and sworn to before me this 14th day of March 1960, Sheila M. Schaum, Notary Public in and for said County and State.

My Comm. Exp.: 4-30-60.

[fol. 24] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

CENTRAL DIVISION

[Title omitted]

OPPOSITION TO MOTION TO QUASH WRIT OF HABEAS CORPUS AD PROSEQUENDUM—Filed March 15, 1960

Comes Now the plaintiff United States of America in opposition to the motion of defendant Paul John Carbo to quash writ of habeas corpus ad prosequendum and respectfully represents:

This Honorable Court has jurisdiction to issue the writ of habeas corpus ad prosequendum.

Wherefore the United States of America respectfully requests the Court to deny said motion.

Laughlin E. Waters, United States Attorney; Lloyd F. Dunn, Special Assistant to the Attorney General; Attorneys for Plaintiff.

[fol. 28] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION
No. 27973 Criminal

UNITED STATES OF AMERICA, Plaintiff,

v.

PAUL JOHN CARBO, aka Frankie Carbo, et al., Defendants.

APPLICATION AND ORDER FOR WRIT OF HABEAS CORPUS AD PROSEQUENDUM—Filed March 16, 1960

Comes Now the United States of America by the United States Attorney, and represents and shows:

That there is now detained in New York City Prison, Bellevue Hospital, New York, New York, in the custody of the Warden, Sheriff or Jailor thereof, the defendant in the above-entitled case, which said case will be called for trial on the 29th day of March, 1960, at the hour of 10:00 a.m., and that it is necessary to have said defendant present in the courtroom of the Honorable Ernest A. Tolin, Judge of the United States District Court, Second Floor, United States Post Office and Courthouse, 312 North Spring Street, Los Angeles, California, and in order to secure the presence of said defendant it is necessary that a Writ of Habeas Corpus ad Prosequendum be issued commanding said Warden, Sheriff or Jailor to produce said defendant in said court on said date, and at such other dates as may be necessary in order to procure his presence for arraignment and plea and all other proceedings incident thereto.

Wherefore, your petitioner prays for an order directing the issuance of a Writ of Habeas Corpus ad Prosequendum out of and under the seal of this court, directed to said Warden, Sheriff or Jailor, commanding him to have and

produce the above-named defendant in said United States District Court at said time, and then and there to present said defendant before the court and from day to day thereafter as may be necessary; and at the termination of the proceedings against said defendant to return him to the custody of said Warden, Sheriff or Jailor.

Dated: March 15, 1960

Laughlin E. Waters, United States Attorney, By Lloyd F. Dunn, Special Assistant to the Attorney General, Attorneys for Plaintiff.

ORDER

Upon reading and filing the foregoing application in that behalf;

It Is Ordered that a Writ of Habeas Corpus ad Prosequendum issue as prayed for herein.

Dated: March 16, 1960

Ernest A. Tolin, United States District Judge.

[fol. 29] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CENTRAL DIVISION

No. 27973-CD

UNITED STATES OF AMERICA, Plaintiff,

v.

PAUL JOHN CARBO, et al., Defendants.

ORDER AND JUDGMENT DENYING MOTION TO QUASH—March 16, 1960

Defendant Paul John Carbo, having filed a Motion to Quash Writ of Habeas Corpus ad Prosequendum, and the matter having been heard on March 16, 1960 before the

undersigned, Judge of the above entitled Court, plaintiff appearing by Lloyd F. Dunn, Special Assistant to the Attorney General, defendant Paul John Carbo, appearing by William B. Beirne and A. L. Wirin, and the matter having been argued and the Court having considered the same,

It Is Hereby Ordered Adjudged and Decreed that the Motion to Quash Writ of Habeas Corpus ad Prosequendum is denied.

Dated: March 16, 1960.

Ernest A. Tolin, Judge, United States Distrct Court.

[fol. 30] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION
No. 27973-CD

[Title omitted]

NOTICE OF APPEAL—Filed March 16, 1960

Name and address of appellant: Paul John Carbo, in custody, Bellevue Hospital, New York City, New York.

Names and addresses of appellant's attorneys: William B. Beirne, 408 South Spring Street, Los Angeles 13, California and A. L. Wirin, 257 South Spring Street, Los Angeles 12, California.

Offense: 18 USC 371, 875(b), 1951.

Concise statement of Judgment: Order denying Motion to Quash Writ of Habeas Corpus ad Prosequendum dated March 16, 1960.

Name of institution where now confined: Bellevue Hospital, New York City, New York.

I, the above-named appellant, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the above-stated judgment and order.

Dated: March 16, 1960.

William B. Beirne, A. L. Wirin, Appellant's Attorneys.

[fol. 32] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CENTRAL DIVISION

No. 27973-CD

[Title omitted]

STIPULATION RE RECORD ON APPEAL FROM ORDER DENYING MOTION TO QUASH WRIT OF HABEAS CORPUS AD PROSEQUENDUM IN RE DEFENDANT PAUL JOHN CARBO—Filed March 16, 1960

It Is Hereby Stipulated between the attorneys for the plaintiff and defendant Paul John Carbo in the above entitled action that the following be the record on appeal from the Order Denying Motion to Quash Writ of Habeas Corpus ad Prosequendum and the Clerk is requested to prepare same:

1. Indictment;

2. Arraignment and plea of defendant Paul John Carbo dated December 2 and 8, 1959, respectively;

3. Application for Writ of Habeas Corpus ad Prosequendum and Order dated March 16, 1960;

4. Defendant Carbo's Motion to Quash Writ of Habeas Corpus ad Prosequendum and Plaintiff's Opposition thereto;

5. Order Denying Motion to Quash Writ of Habeas Corpus ad Prosequendum;

6. Notice of Appeal;

[fol. 33] 7. This Stipulation and Designation.

Dated: March 16, 1960.

Laughlin E. Waters, United States Attorney; Lloyd F. Dunn, Special Assistant to the Attorney General; By Charles G. Lynberg, A.U.S.A., Attorneys for Plaintiff.

William B. Beirne, A. L. Wirin, Attorneys for Defendant Paul John Carbo.

[fol. 33a] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

16820

No. 27973 Criminal

UNITED STATES OF AMERICA, Plaintiff,

v.

PAUL JOHN CARBO, aka Frankie Carbo, et al., Defendants.

WRIT OF HABEAS CORPUS AD PROSEQUENDUM—
March 16, 1960

The President of the United States of America

To: The Warden, Sheriff or Jailor of New York City Prison, Bellevue Hospital, New York, New York.

Greeting

We Command that you produce and deliver the body of Paul John Carbo aka Frankie Carbo now in your custody before the Honorable Ernest A. Tolin, Judge of the United States District Court, Second Floor, United States Post Office and Courthouse, 312 North Spring Street, Los Angeles, California, on March 29, 1960, at the hour of 10:00 a.m., in order that said defendant in the above-entitled case may then and there be tried at said time and place, and also at such other times as may be ordered by the said court, and have you then and there this writ.

The delivery of the body of said Paul John Carbo aka Frankie Carbo to the Courtroom of said United States District Court, as aforesaid, and the return by you of said defendant to your custody shall be deemed sufficient compliance with the writ.

Witness the Honorable Ernest A. Tolin, Judge of the United States District Court for the Southern District of California.

Dated: March 16, 1960

Clerk, United States District Court, Southern District of California, By W. A. White, Deputy Clerk.

[fol. 35]

IN UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CENTRAL DIVISION

Honorable Ernest A. Tolin, Judge Presiding

No. 27,973-Crim.

UNITED STATES OF AMERICA, Plaintiff,

vs.

PAUL JOHN CARBO, et al., Defendants.

Reporter's Partial Transcript of Proceedings—March 16, 1960

APPEARANCES:

For the Plaintiff: Laughlin E. Waters, United States Attorney, Lloyd F. Dunn, Special Assistant to Attorney Gen'l, 762 Federal Building, Los Angeles, California.

For the Defendant, Paul John Carbo: William B. Beirne, 408 South Spring Street, and A. L. Wirin, 257 South Spring Street, Los Angeles, California.

[fol. 36] Los Angeles, California,

Wednesday, March 16, 1960. 2:00 P.M.

* * * * * * *

The Court: The motion is denied. In peremptorily denying it I do not mean that it isn't worthy of discussion. I think this is a question which should go to the Court of Appeals. It is perhaps a question upon which the Supreme Court should be given an opportunity to adjudicate.

By raising the question now, at this time, you are going to get it to that court probably before it is moot; that is, having in mind the possibilities in the lawsuit. It might become moot by dismissal or an acquittal or something of

that kind. But, in any event, you should undertake proceedings such as you have done in this case at about this time.

I think your record to the Court of Appeals is better if you don't have a stay, but if you want one you may have it. Also regardless of stay, just as a matter of courtesy, you are all gentlemen who get along well together. Mr. Dunn and the Marshal will cooperate and do whatever is practical I am sure.

The clerk will enter the order of denial immediately so you can get your appeal under way.

Mr. Wirin: Your Honor is quite correct. And may I observe that counsel on both sides apparently have gotten [fol. 37] along very well and therefore we are content to leave the matter as it is.

The Court: Thank you.

Mr. Wirin: We have a form of Order, your Honor, which we will hand to the clerk and copies to the other side, so that there may be a written order in the file. Then we will repair to the Clerk's office and see what influence we have with the clerk to get—

The Court: You anticipated my ruling.

Mr. Wirin: Well, we knew about the DeSimone ruling.

The Court: You didn't prepare two orders, one each way, did you?

Hand it up and I will sign it immediately so you can get on your way.

Mr. Wirin: Thank you. Mr. Dunn says it is agreeable as to form.

The Court: I have signed it and if you take it in to the Clerk's office they will process it for you immediately.

Mr. Wirin: Thank you.

Mr. Beirne: Thank you very much.

(Whereupon, at 2:40 o'clock p.m. Wednesday, March 16, 1960, an adjournment was taken.)

[fol. 38] Reporter's Certificate (omitted in printing).

[fol. 40]

IN UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Before: Stephens, Pope and Hamlin, Circuit Judges.

ORDER OF SUBMISSION—March 22, 1960

Ordered (1) Motion of Appellee to dismiss the appeal herein, (2) Motion of Appellant for Stay of Proceedings, (3) Motion of Appellant for leave to file Petition for Writ of Mandamus, and (4) cause on merits, presented by Mr. Lloyd F. Dunn, Special Assistant to the Attorney General, counsel for the Appellee, and by Mr. A. L. Wirin, counsel for the Appellant, and submitted to the Court for consideration and decision.

Pursuant to stipulation of counsel for respective parties, It Is Further Ordered that the Writ of Habeas Corpus ad Prosequendum, dated March 16, 1960, be filed and be made a part of the record before this Court.

[fol. 41]

IN UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Before: Stephens, Pope and Hamlin, Circuit Judges.

MINUTE ENTRY OF ORDER DIRECTING FILING OF OPINION AND FILING AND RECORDING OF JUDGMENT—March 23, 1960

Ordered that the typewritten opinion this day rendered by this Court in above cause be forthwith filed by the Clerk, and that a Judgment be filed and recorded in the minutes of the Court in accordance with the opinion rendered.

[fol. 42] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

[Title omitted]

ORDER RE SUBMISSION—March 23, 1960

This cause came on to be heard this day upon the motion of the United States to dismiss the appeal, and was argued by counsel. Upon conclusion of the argument, it was stipulated by counsel for both sides that the appeal itself might be deemed submitted to the court for decision upon the merits, upon the record as filed, and the briefs and memoranda of the parties now on file with the court, and without further briefs or argument.

The court having considered the matter further, it is ordered that the cause be and it is hereby ordered submitted, (1) upon the motion to dismiss the appeal, and (2) upon the merits of the appeal itself.

Albert Lee Stephens, Walter L. Pope, Oliver D. Hamlin, Circuit Judges.

[fol. 43]

IN UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 16,820

PAUL JOHN CARBO, Appellant,

vs.

UNITED STATES OF AMERICA, Appellee.

On Appeal From the United States District Court for the Southern District of California, Central Division

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PER CURIAM OPINION—March 23, 1960

Before: Stephens, Pope and Hamlin, Circuit Judges.

Per Curiam:

A 10-count indictment was returned by the Grand Jury in the Southern District of California, Central Division, on September 22, 1959, charging Paul John Carbo, aka Frankie Carbo, hereinafter appellant, and four others with violations of 18 U.S.C.A. §§ 1951, 875(b) and 371. Appellant posted bond at Baltimore, Maryland, returnable to the United States District Court at Los Angeles in the sum of $100,000.00. Thereafter, but prior to his appearance in Los Angeles upon the charges contained in the indictment filed there, appellant was charged with and pleaded guilty to three misdemeanor counts in New York City, New York, and was sentenced to two years in prison and fined. During appellant's New York confinement in prison, the New York authorities honored a writ of habeas corpus ad prosequendum issued by the District Court for the Southern District of California and permitted appellant to appear in said court at Los Angeles to answer to the charges in the indictment. On December 2, 1959, when he appeared in said Court, he was arraigned on the charges contained in

the indictment, and stated that he had posted a $100,000.00 bond. On December 8, in said District Court, the defendant [fol. 44] requested permission to enter his plea and be permitted to return to New York and later return to Los Angeles for trial. Appellant entered a plea of not guilty to counts 1, 3, 5, 7 and 9 of the indictment, and the Court then set the case against all defendants for trial on March 29, 1960, and at appellant's request directed that he be returned to New York for the purpose of obtaining counsel and be returned to the Southern District of California in time for trial.

On March 16, 1960, after application by the United States Attorney, the District Judge in said district directed the issuance of a document entitled "Habeas Corpus Ad Prosequendum" directed to the jailer of New York City Prison, Bellevue Hospital, New York City, New York, commanding him to produce the appellant in the District Court for his trial upon March 29, 1960. Appellant filed in said District Court a motion to quash said writ and the United States Attorney filed an opposition to such motion. After hearing, the District Court denied appellant's motion to quash.

Appellant thereupon appealed to this Court from said order of denial.

On March 22, 1960, after a motion to dismiss said appeal had been filed by the United States Attorney, counsel for the appellant and the United States filed memoranda of authorities and orally argued the matter before this Court. It was stipulated by counsel for appellant and for the United States that the appeal itself might be deemed submitted to this Court for decision upon the merits, upon the record as filed and the briefs and memoranda of the parties on file with the Court, and without further briefs or argument, and this Court so ordered.

Appellant contends that the District Court had no jurisdiction to issue the writ in question, because the appellant is in custody in New York out of the territorial jurisdiction of the District Court.

Appellant relies upon *Ahrens* v. *Clark*, 335 U.S. 188, decided June 21, 1948. In that case, the petitioners were confined in New York and the petitions for habeas corpus alleging the illegal restraint of their liberty in New York

were filed in the District Court of the District of Columbia. [fol. 45]. The statute there under consideration by the Court then provided (28 U.S.C. 452):

> "The several justices of the Supreme Court and the several judges of the circuit courts of appeal and of the district courts, within their respective jurisdictions, shall have power to grant writs of habeas corpus *for the purpose of an inquiry into the cause of restraint of liberty.* A circuit judge shall have the same power to grant writs of habeas corpus within his circuit, that a district judge has within his district; and the order of the circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had." (Emphasis ours)[1]

The Court stated at page 190:

> "The question at the threshold of the case is whether the words 'within their respective jurisdictions' limit the district courts to inquiries into the *causes of restraints of liberty* of those confined or restrained within the territorial jurisdictions of those courts." (Emphasis ours)

In the instant case there is no question before the Court of any illegal restraint of liberty. The appellant does not complain that he is illegally restrained by any authority. His only objection is his contention that the United States District Court cannot by its order arrange to have him brought from New York to Los Angeles for trial upon charges contained in an indictment on file in the District Court there. The *Ahrens* case is not in point.

There is a distinction between the writ of habeas corpus ad subjiciendum which was under consideration in the *Ahrens* case and the writ of habeas corpus ad prosequen-

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[1] The successor to this section is 28 U.S.C. 2241. The reviser's notes to this section state:

> "Words 'for the purpose of an inquiry into the cause of restraint of liberty' in section 452 of Title 28, U.S.C., 1940 ed., were omitted as merely descriptive of the writ."

dum which is under consideration in this case. *Price* v. *Johnston*, 334 U.S. 266, at 281.[2]

[fol. 46] The purpose of the writ of habeas corpus ad subjiciendum (sometimes called The Great Writ) is to inquire as to the legality of the prisoner's restraint. It was this writ that the Supreme Court was discussing in *Ahrens*.

The writ of habeas corpus ad prosequendum has an entirely different purpose. The legality of the prisoner's restraint is not in question. It is issued "when it is necessary to remove a prisoner . . . in order to . . . be tried in the proper jurisdiction wherein the fact was committed." *Price* v. *Johnston, supra*. That this should be done is indicated by the language of the Supreme Court in *Ponzi* v. *Fessenden*, 258 U.S. at 264, where it is said:

> "The authorities, except when special statutes make an exception are all agreed that the fact that a defendant in an indictment is in prison serving a sentence for another crime gives him no immunity from the second prosecution. . . . Delay in the trial of accused persons greatly aids the guilty to escape because witnesses disappear, their memory becomes less accurate and time lessens the vigor of officials charged with the duty of prosecution. If a plea of guilty and imprisonment for one offense is to postpone trial on many others it furnishes the criminal an opportunity to avoid the full expiation of his crimes."

Respondent contends that the District Court had power to issue the writ in question under 28 U.S.C.A. § 1651(a), which reads as follows:

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[2] Black's Law Dictionary, 4th Ed. 1957, contains the following at page 837:

HABEAS CORPUS. Lat. (You have the body.) The name given to a variety of writs, (of which these were anciently the emphatic words,) having for their object to bring a party before a court or judge. In common usage, and whenever these words are used alone, they are understood to mean the *habeas corpus ad subjiciendum*, (see infra). Dancy v. Owens, 126 Okl. 37, 258 P. 879, 884; In re McDevitt, 101 Misc. 588, 168 N.Y.S. 433; U.S. v. Tod, 263 U.S. 149, 44 S.Ct. 54, 57, 68 L.Ed. 221; Payne v. Graham, 20 Ala.App. 439, 102 So. 729, 731.

> The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

The District Court had jurisdiction of the offense charged against the defendant-appellant and of the appellant him- [fol. 47] self. After his arrest he had given a bond conditioned upon his appearance in the District Court at appropriate times; he had appeared in the District Court in answer to the charge against him; had entered a plea of not guilty; and had consented to a trial date being set. At his request, he was permitted to return to New York pending his trial.

Under § 1651 the District Court had the power to issue all writs necessary or appropriate in aid of its jurisdiction. As illustrative of the fact that the power of the District Court may extend beyond its territorial limits, attention may be called to two rules of the Federal Rules of Criminal Procedure, which have the force of law.

Under Rule 4 of the F.R.C.P., providing for warrants of arrest, subdivision (c)(2) provides: "The warrant may be executed . . . at any place within the jurisdiction of the United States."

Under Rule 17 F.R.C.P., providing for the attendance of witnesses, subdivision (e)(1) provides: "A subpoena requiring the attendance of a witness at a hearing or trial may be served at any place within the United States." These rules make it plain that the jurisdiction of a District Court for certain purposes is not limited to the territorial jurisdiction of that Court.

In *United States* v. *Hayman*, 342 U.S. 205, the Supreme Court had occasion to consider the power of a District Court in a section 2255 proceeding. In holding there that the District Court had the power to order the presence of a prisoner who was confined in another district, the Supreme Court said:

> "The very purpose of Section 2255 is to hold any required hearing in the sentencing court because of the inconvenience of transporting court officials and other

necessary witnesses to the district of confinement. The District Court is not impotent to accomplish this purpose, at least so long as it may invoke the statutory authority of federal courts to issue 'all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.' An order to secure respondent's presence in the sentencing court to testify or otherwise prosecute his motion is 'necessary or appropriate' to the exercise of its jurisdiction under Section 2255 and finds ample precedent in the common law."

[fol. 48] We believe that in this case the District Court is not impotent to bring before it for trial a defendant who has been indicted by that Court, who has entered a plea of not guilty in that Court, and who at his request has gone to the State of New York, and whose presence is now required in the Southern District of California for the purpose of proceeding with the prosecution against him.

We hold that the writ issued in this case by the District Court was proper under 28 U.S.C.A. § 1651(a) as being necessary and appropriate in aid of its jurisdiction.

Judgment affirmed.

Appellant has also presented a motion for leave to file a petition for a writ of mandamus directed to the District Court to quash the issued writ and a motion to stay enforcement of the issued writ. Each of said motions is denied.

[fol. 49] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 16,820

PAUL JOHN CARBO, Appellant,

vs.

UNITED STATES OF AMERICA, Appellee.

JUDGMENT—March 23, 1960

Appeal from the United States District Court for the Southern District of California, Central Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California, Central Division, and on motion of Appellee to dismiss appeal, and motion of Appellant for stay of proceedings, and petition of Appellant for leave to file petition for writ of mandamus, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is affirmed, that the motion for stay of proceedings, be, and hereby is denied, and that the motion for leave to file petition for writ of mandamus, be, and hereby is denied.

[fol. 50] Clerk's Certificate (omitted in printing).

[fol. 51]

IN UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PAUL JOHN CARBO, Appellant,

v.

UNITED STATES OF AMERICA, Appellee.

NOTICE OF MOTION TO DISMISS APPEAL—Filed March 18, 1960

To: Paul John Carbo and his attorneys:

Please Take Notice that on March 22, 1960, at 9:30 A.M., or as soon thereafter as counsel may be heard in the courtroom of the United States Court of Appeals for the Ninth Circuit, located on the third floor of the United States Post Office and Courthouse, 7th and Mission Streets, San Francisco, California, the appellee will move said court for an order dismissing the appeal and for such other relief as may be appropriate.

Laughlin E. Waters, United States Attorney; Lloyd F. Dunn, Special Assistant to the Attorney General, Attorneys for Appellee, United States of America.

[fol. 52]

IN UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Title omitted]

MOTION TO DISMISS APPEAL—Filed March 18, 1960

Appellee, the United States of America, respectfully moves this court for an order dismissing the appeal on the grounds that (1) the order denying the motion to quash

writ of habeas corpus ad prosequendum is interlocutory and nonappealable at this time, (2) the appellant has no standing to object to the issuance of the writ of habeas corpus ad prosequendum, it being solely a matter between two sovereign powers, the United States of America and the State of New York, and (3) the appeal is frivolous and taken solely for the purpose of delay. This motion is made pursuant to Rules 73 and 75(j) of the Federal Rules of Civil Procedure, Title 28, United States Code.

Statement of Facts

On September 22, 1959, a Federal grand jury for the Southern District of California returned an indictment charging appellant Paul John Carbo and four others with [fol. 53] conspiracy and other violations of Federal criminal law. Appellant posted bond at Baltimore, Maryland, returnable to the Federal District Court at Los Angeles. Before his appearance in Los Angeles, however, appellant came into the custody of officers of the City of New York on other pending charges. Appellant plead guilty to three misdemeanor counts in New York City, New York, and was sentenced to two years in prison and fined. Meanwhile the other defendants had all appeared and entered not guilty pleas to the Federal charges, and a trial date was set. After appellant's New York sentence, the New York authorities honored a writ of habeas corpus ad prosequendum permitting appellant to appear in the Federal District Court at Los Angeles. He was arraigned on December 2, 1959, and plead not guilty on December 8. Thereafter, because of appellant's physical ailments and at his request, the Federal District Court caused appellant to be returned to New York, discharging the writ of habeas corpus ad prosequendum. Appellant has since remained in a prison hospital in New York City.

On March 16, 1960, the Federal District Court for the Southern District of California issued a new writ of habeas corpus ad prosequendum directing that appellant be brought to Los Angeles for trial on the Federal indictment to commence March 29, 1960. This date had previously been set by the Court and agreed to by the defendant. Ap-

pellant immediately filed a motion to quash the writ on the [fol. 54] ground that the Court had no jurisdiction to issue such process beyond the boundaries of the District. The Government is an [sic] opposition to the motion to quash. The motion was heard and denied on March 16, 1960. Appellant, on the same day, filed notice of appeal of the order denying his motion.

Object of This Motion

This motion is brought for the purpose of obtaining an expeditious dismissal of this appeal, which is improper in that the order denying appellant's motion to quash is an interlocutory order in a criminal proceeding, and for the further reason that appellant as a prisoner of the New York authorities has no standing to question the issuance of this writ, and for the additional reason that the appeal is patently frivolous and brought solely for the purpose of delaying the trial which is now set for March 29, 1960.

This motion is accompanied by a memorandum of points and authorities and affidavit, and is based on all these documents together with the Clerk's transcript of record.

Wherefore, the United States of America respectfully requests this honorable court to dismiss the appeal and for prompt issuance of its mandate in order that the scheduled trial may not be delayed.

Respectfully submitted,

Laughlin E. Waters, United States Attorney; Lloyd F. Dunn, Special Assistant to the Attorney General, Attorneys for Appellee, United States of America.

[fol. 55]

AFFIDAVIT OF LLOYD F. DUNN

Lloyd F. Dunn, being first duly sworn deposes and says:

That he is an attorney-at-law, admitted to practice in the State of California and in this Honorable Court; that he is a Special Assistant to the Attorney General of the United States stationed at Los Angeles, California.

On September 22, 1959, a Federal grand jury for the Southern District of California returned an indictment charging appellant Paul John Carbo and four others with conspiracy and other violations of Federal law. Appellant was arrested in Baltimore, Maryland, where he posted bond returnable to Los Angeles, California. Prior to his appearance in Los Angeles, appellant came into custody of officials of the City of New York, State of New York, on criminal charges. Thereafter appellant plead guilty to three misdemeanor counts and was sentenced to imprisonment and a fine. After completion of the proceedings in New York and [fol. 56] during his confinement by the authorities of that State, appellant was produced in the Federal District Court at Los Angeles under a writ of habeas corpus ad prosequendum. He was arraigned on the Federal charges on December 2, 1959, and plead not guilty on December 8. The District Court at Los Angeles fixed March 29, 1960, as the date for trial. Upon appellant's request and due to his physical condition, appellant was returned to the City of New York where he has been held in a prison hospital.

On March 16, 1960, a Federal District Court at Los Angeles issued a second writ of habeas corpus ad prosequendum to return the appellant to Los Angeles for trial. Appellant filed a motion to quash this writ on the ground that the Court did not have power to issue such process beyond its territorial jurisdiction. An opposition was filed on behalf of the Government. The motion was heard and denied on March 16, 1960. Appellant filed an immediate notice of appeal.

It is the Government's position (1) that the habeas corpus was process issued in aid of the Court's criminal jurisdiction, and that as such the order denying the motion to quash

is an interlocutory order and not appealable until after the conclusion of the matter, (2) that the appellant has no standing to challenge the writ of habeas corpus ad prosequendum which is wholly a matter between two political sovereigns, the United States of America and the State of [fol. 57] New York, and (3) that the motion to quash and the appeal from its denial at this time are frivolous actions of appellant taken only for the purpose of delay inasmuch as trial has been set for a period of several months for March 29, 1960.

Respectfully submitted,

Laughlin E. Waters, United States Attorney; Lloyd F. Dunn, Special Assistant to the Attorney General, Attorneys for Appellee, United States of America.

Subscribed and Sworn to before me this 17th day of March, 1960.

John A. Childress, Clerk, U. S. District Court, Southern District of California, By Wm. A. White, Deputy.

[fol. 58]

IN UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 16820

[Title omitted]

NOTICE OF MOTION FOR STAY PENDING APPEAL

To: United States of America, appellee, and Lloyd F. Dunn, one of its counsel:

Please Take Notice that on March 22, 1960, at 9:30 a.m., or as soon thereafter as counsel may be heard in the courtroom of the United States Court of Appeals for the Ninth

Circuit, located on the third floor of the United States Post Office and Courthouse, 7th and Mission Streets, San Francisco, California, the appellant will move said Court for an Order staying the enforcement, pending appeal, of the Writ of Habeas Corpus Ad Prosequendum issued by the United States District Court below.

The appellant will rely upon the files and records on appeal herein, upon the Memorandum of Points and Authorities in opposition to the Appellee's Motion to Dismiss and upon the Affidavit of William B. Beirne filed herein.

William B. Beirne, A. L. Wirin, Attorneys for Appellant.

[fol. 59]

AFFIDAVIT OF WILLIAM B. BEIRNE

State of California)
County of Los Angeles) ss.

William B. Beirne, being first duly sworn, deposes and says that:

He is one of the attorneys for the appellant herein; the affiant has received a letter from J. A. Hummel, M.D. of Bellevue Hospital in New York, a photocopy of which is annexed hereto and incorporated herein.

William B. Beirne

Subscribed and sworn to before me this 18th day of March 1960. Sheila M. Schaum, Notary Public in and for said County and State. My Commission Expires: 4-30-60.

[fol. 60]

ATTACHMENT TO AFFIDAVIT

NEW YORK UNIVERSITY-BELLEVUE MEDICAL CENTER
NEW YORK UNIVERSITY POST-GRADUATE MEDICAL SCHOOL
550 FIRST AVENUE, NEW YORK 16, N. Y.
DEPARTMENT OF UROLOGY OREGON 9-3200

March 11, 1960

TO WHOM IT MAY CONCERN:

Mr. Paul Carbo has been a patient of Fourth Division Urology on Ward I-1 in Bellevue Hospital since January 26, 1960.

His admitting diagnosis was hematuria secondary to Uric Acid renal stones. He had been treated previously, September 1959 in Johns Hopkins Hospital, Baltimore for the same condition.

Intravenous Pyelogram on January 26, 1960 revealed right calyectasis with delayed emptying of dye and a partial occlusion of the (R) ureter, secondary to a non-radio-opaque obstruction.

Retrograde pyelogam of January 29, 1960 revealed partial occlusion of the uretero-pelvic junction of the right renal collecting system possibly due to Uric acid fragments.

The patient's pertinent past medical history includes:

1. Myocardial infact—1948 He is on no cardiac drugs at present.
2. Gout—(R) hallux 1950.
3. Diabetes Mellitus. Diagnosed approximately one year prior to this hospital admission. Now controlled on diet alone.

The patient's course on this admission has been relatively benign except for two occasions on which he ran a fever in the range of 102-105° for approximately 5 days each time. The first episode occurred following retrograde pyelography and subsides with therapy. The second oc-

curred while the patient was on therapy and despite therapy. (March 4 thru March 9). This break-through of the disease despite therapy now raised the question of the possible necessity of surgical intervention to alleviate his renal problem.

Until we can be sure that this will not be necessary, or that the trip to California will not adversely affect Mr. [fol. 61] Carbo's prognosis, we would prefer to keep him here under observation.

At present his therapy consists of:

1. Furadantin and Chloromycetin to combat urinary tract infection.
2. Polycitia to alkalinize the urine and prevent the formation and aid the dissolution of uric acid stones.
3. Antipyritic therapy as needed.

We will be happy to arrange for his transfer to the west coast at the earliest possible moment.

We strongly urge that, on arrival in California, Mr. Carbo be placed in a medical facility where he can receive careful observation and attention for his nephrolithiasis. Neglecting this condition could result in serious consequences.

Respectfully,

/s/ J. A. Hummel, M.D.

J. A. Hummel, M.D.
Fourth Division Urology
Bellevue Hospital
New York, New York

JAH:erb

[fol. 62] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PAUL JOHN CARBO, Petitioner,

v.

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF CALIFORNIA, Respondent.

NOTICE OF MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF MANDAMUS—Filed March 21, 1960

To the Respondent and Lloyd F. Dunn, its attorney:

Please Take Notice that on March 22, 1960, at 9:30 a.m., or as soon thereafter as counsel may be heard in the courtroom of the United States Court of Appeals for the Ninth Circuit, located on the third floor of the United States Post Office and Courthouse, 7th and Mission Streets, San Francisco, California, the petitioner will move said Court for leave to file the Petition for Writ of Mandamus submitted herewith.

The petitioner will rely upon the Memorandum of Points and Authorities filed in *Carbo* v. *United States*, No. 16820.

William B. Beirne, A. L. Wirin, Attorneys for Petitioner.

[fol. 63]

PETITION FOR WRIT OF MANDAMUS

I

The petitioner is presently at the Bellevue Hospital in New York and is the appellant in *Carbo* v. *United States of America*, No. 16820 in this Court.

II

The respondent is the United States District Court for the Southern District of California.

III

On March 16, 1960 the respondent court issued a writ of Habeas Corpus ad Prosequendum as to the petitioner; and denied the petitioner's Motion to Quash said Writ.

Said Court had no jurisdiction and/or exceeded its jurisdiction in entering both such orders.

IV

The petitioner incorporates herein by reference the allegations made as appear in the files and records of said [fol. 64] appeal currently pending before this Court aforesaid, *Carbo* v. *United States of America*, No. 16820.

V

The appellee in said above entitled appeal contends that the orders of said District Court aforesaid are interlocutory orders and not subject to review.

VI

In the event this Court determines that said orders are not appealable and not subject to review, the petitioner will suffer irreparable injury, as set forth more particularly in the files and records in said *Carbo* v. *United States*, this Court, No. 16820, aforesaid:

Wherefore, the petitioner prays that this Court issue its Writ directing the respondent court to vacate the Writ

of Habeas Corpus ad Prosequendum aforesaid; and to vacate its order denying the petitioner's Motion to Quash said Writ aforesaid; for appropriate relief pendente lite before this Court; and for such other relief to which the petitioner may be entitled in the premises.

William B. Beirne, A. L. Wirin, Attorneys for Petitioner.

[fol. 65] VERIFICATION (omitted in printing).

[fol. 66]

IN UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Title omitted]

NOTICE OF MOTION FOR STAY

To the Respondent and Lloyd F. Dunn, its attorney:

Please Take Notice that on March 22, 1960, at 9:30 a.m., or as soon thereafter as counsel may be heard in the courtroom of the United States Court of Appeals for the Ninth Circuit, located on the third floor of the United States Post Office and Courthouse, 7th and Mission Streets, San Francisco, California, the petitioner will move said Court for an Order staying the enforcement, pending determination of the within proceedings, of the Writ of Habeas Corpus Ad Prosequendum issued by the United States District Court below.

The petitioner will rely upon the files and records of this Court in the instant matter; the Memorandum of Points and Authorities filed herein; and the Memorandum of Points and Authorities filed in *Carbo* v. *United States*, No. 16820.

William B. Beirne, A. L. Wirin, Attorneys for Petitioner.

[fol. 67]

IN UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MOTION FOR STAY—Filed March 25, 1960

WESTERN UNION

(Stamp—Filed, Mar. 25 1960, Frank H. Schmid, Clerk.)

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UNITED STATES COURT OF APPEALS,
ATTN. JUDGE ALBERT LEE STEPHENS,
UNITED STATES POSTOFFICE AND COURTHOUSE,
SFRAN.

INTEND FILE IMMEDIATELY PETITION FOR WRIT OF CERTIORARI UNITED STATES SUPRI ME COURT, CARBO V. UNITED STATES, NO. 16820. PLEASE CONSIDER THIS TELEGRAM AS APPLICATION FOR STAY OF ENFORCEMENT OF WRIT OF HABEAS CORPUS AD PROSEQUENDUM ISSUED BY UNITED STATES DISTRICT COURT PENDING PETITION FOR WRIT OF CERTIORARI.

WILLIAM B. BEIRNE AND A. L. WIRIN ATTORNEYS FOR APPELLANT CARBO

[fol. 68]

IN UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PAUL JOHN CARBO, Appellant,

vs.

UNITED STATES OF AMERICA, Appellee.

ORDER DENYING MOTION FOR STAY AND DIRECTING IMMEDIATE ISSUANCE OF MANDATE—March 25, 1960

Before: Stephens, Pope and Hamlin, Circuit Judges.

The telegram petition for stay of enforcement of writ of habeas corpus ad prosequendum heretofore issued in the proceeding of Carbo vs. United States of America, No. 16820, pending petition for the writ of certiorari to the United States Supreme Court is denied, and it is ordered that our mandate issue immediately.

Albert Lee Stephens, Walter L. Pope, Oliver D. Hamlin, Circuit Judges.

Endorsed.

Filed March 25, 1960, Frank H. Schmid, Clerk.

[fol. 69] Clerk's Certificate (omitted in printing).

[fol. 70]

SUPREME COURT OF THE UNITED STATES

No. 875, October Term, 1959

PAUL JOHN CARBO, Petitioner,

vs.

UNITED STATES.

ORDER ALLOWING CERTIORARI—May 31, 1960

The petition herein for a writ of certorari to the United States Court of Appeals for the Ninth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

LE COPY

Office-Supreme Court, U.S.
FILED
APR 20 1960
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

October Term, 1959.

No. 872

PAUL JOHN CARBO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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IN THE

Supreme Court of the United States

October Term, 1959.
No. .....

PAUL JOHN CARBO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioner, Paul John Carbo, respectfully prays for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit in order to review its judgment affirming an order and judgment of the United States District Court for the Southern District of California denying a motion to quash a writ of *habeas corpus ad prosequendum.*

Opinions Below.

The District Court delivered no written opinion upon making its order denying petitioner's motion to quash the writ.

The opinion of the court below [R. III, 4][1] is not yet reported. It is appended hereto as Appendix "A."

The judgment of the court below [R. III, 10] is appended hereto as Appendix "B."

[1]The record certified to this Court is in four volumes, denominated: I, II, III and Supplemental. Each volume is paginated separately. Accordingly, R. III, 4 refers to page 4 of Volume III, etc. "Supp" will refer to the supplemental transcript of record.

Grounds on Which the Jurisdiction of This Court Is Invoked.

1. The date of the judgment sought to be reviewed and the time of its entry is March 23, 1960 [R. I, 29].

2. No petition for rehearing was filed.

3. The statutory provisions believed to confer on this Court jurisdiction to review the judgment in question by writ of certiorari are 28 U. S. C. 1254(1) and 2101(c), Rule 22(2) and (3) of this Court and Rule 37(b), Federal Rules of Criminal Procedure.

Questions Presented for Review.

Does a United States District Court have jurisdiction under 28 U. S. C., 2241 or 28 U. S. C., 1651 to issue a writ of *habeas corpus ad prosequendum* requiring the production of a prisoner, then confined beyond the court's territorial jurisdiction, for trial before the issuing District Court?

Statutes Involved.

28 U. S. C., 2241 (62 Stat. 964, amended 63 Stat. 105) provides:

"(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

"(b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.

"(c) The writ of habeas corpus shall not extend to a prisoner unless:

"(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or,

"(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

"(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or,

"(4) He, being a citizen of a foreign state and domiciled therein, is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations or

"(5) It is necessary to bring him into court to testify or for trial."

28 U. S. C., 1651 (62 Stat. 944, amended 63 Stat. 102); provides:

"(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

"(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction."

Statement of the Case.

Basis for Federal Jurisdiction in the Court of First Instance.

It is claimed by respondent that the trial court had jurisdiction under 28 U. S. C., 2241 and 1651.

Facts.

Petitioner is a defendant in a criminal proceeding pending in the United States District Court for the Southern District of California [R. I, 2]. He had been arraigned on December 2, 1959 [R. I, 18] and had pleaded not guilty on December 8, 1959 [R. I, 19].

On March 16, 1960, application was made to the District Court by the United States Attorney for a writ of *habeas corpus ad prosequendum* for the production of the body of petitioner in Los Angeles on March 29, 1960 for trial [R. I, 28]. That same day the court ordered the issuance of the writ [R. I, 28], and the writ was issued [R. II, 5].

On the same day petitioner filed a motion to quash the writ on the ground that the court had no jurisdiction to issue it [R. I, 20].[2] The motion was denied [R. I, 29] and notice of appeal to the court below was immediately filed [R. I, 30].

Respondent noticed a motion to dismiss the appeal with the court below for March 22, 1960 [R. Supp., 1].

On March 23, 1960 the court below affirmed, on the merits [R. II, 3], the order of the District Court denying the motion to quash the writ (App. A).

During all this time, and since, petitioner was and is ill and detained in the prison ward of the New York City Bellevue Hospital [R. I, 21, 22]. Because of that illness petitioner underwent a serious kidney operation on March 25, 1960. On March 28, 1960, the District Court continued the trial of the cause to July 12, 1960 and ordered the issuance of an amended writ, staying the enforcement thereof to June 24, 1960.[3] One of the reasons for the court's so doing was to afford this Court an opportunity to determine the issue herein and to avoid the mooting of this petition.

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[2]Petitioner's motion to quash was actually filed two days before, on March 14, 1960 [R. I, 20]. The explanation for this is that a previous application and order for a writ had been made on March 11, 1960 by the United States Attorney but was defective in form. By stipulation in open court on March 16 (the return date of petitioner's motion to quash the previous writ) it was agreed that the moving papers and the Government's return [R. I, 24] would be deemed to be addressed to the March 16 papers.

[3]A copy of the Order is attached hereto as Appendix "C," and of the Amended Writ issued pursuant thereto, as Appendix "D."

REASONS FOR GRANTING THE WRIT AND ARGUMENT AMPLIFYING SAME.

Preliminary Statement.

It seems perfectly plain from this Court's decision in *Ahrens v. Clark*, 335 U. S. 188, as well as from its decision in *United States v. Hayman*, 342 U. S. 205, that the power given the District Courts by 28 U. S. C., 2241, is limited territorially whether the particular writ involved is *habeas corpus ad subjiciendum*, as in *Ahrens*, or *testificandum* or *prosequendum*, has here. Accordingly, for the court to have power to issue an extraterritorial writ, that power must somehow be spelled out of 28 U. S. C., 1651, an exercise in orthography we say cannot be done. This, because of the general rule that absent "specific exceptions created by Congress the jurisdiction of the district courts is territorial" (*Ahrens v. Clark*, 335 U. S. at 190, and because the cases, as well as the language of the section, seem clear to the effect that 1651[4] does not, nor did Congress intend to, enlarge the jurisdiction of the courts. It is the court below's misapprehension of this fact that necessitates this petition and the granting thereof herein.

I.

The Decision of the Court Below Is in Conflict With Decisions of Other Courts of Appeal.

Seventh Circuit.

In *Edgerly v. Kennelly*, 215 F. 2d 420 (1954), cert. den. 348 U. S. 938, the court held that the District Courts did not have jurisdiction to issue an extraterritorial writ of *habeas corpus ad testificandum*. In answer to the argu-

[4]Its predecessor, as well as that of 2241, have been on the statute books from the beginning (1 Stat. 81; Sec. 14 of Act of Sept. 24, 1789).

ment that because the court had jurisdiction over plaintiff's action under the Civil Rights Act (former 8 U. S. C., 43, 47, 48, now 42 U. S. C., 1983, 1985, 1986), it has jurisdiction to bring him before the court under 28 U. S. C., 1651, the court said (pp. 421-422):

> ". . . Plaintiff . . . concedes . . . that the jurisdiction of the court, if it exists, must be found in the 'all writs statute,' 28 U.S.C.A. §1651, which authorizes a court to 'issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.' It is pointed out that the court had jurisdiction of the action and it was in aid of its jurisdiction that the plaintiff be brought to Chicago to testify in his own behalf. This contention, if accepted, would mean that this provision enlarged the territorial jurisdiction of the court. We think that such is not its purpose. While the section augments the power of a court in cases of existing jurisdiction, it in no wise expands or extends its territorial jurisdiction."[5]

While *Goldberg v. Hoffman*, 225 F. 2d 463 (1955), did not involve an *ad testificandum* or *ad prosequendum* matter, it is clear that the Seventh Circuit adheres to its *Edgerly* decision and considers it to be sound law. Thus it said (pp. 467):

> "The historic limitation of the jurisdiction of the various federal courts to the Circuit or District in

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[5]*Cf. Shimola v. Local Board No. 42*, 40 Fed. Supp. 808, 809 (N. D. Ohio 1941):

> "That section (28 USC 377, the predecessor to the now 28 USC 1651) however, merely makes available to the District Court 'all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions', but it does not confer or expand jurisdiction."

> which they sit is too well established to require restatement. Georgia v. Pennsylvania R. Co., 324 U. S. 439, 467, 65 S. Ct. 716, 89 L. Ed. 1051; Edgerly v. Kennelly, 7 Cir., 215 F. 2d 420; Reconstruction Finance Corp. v. Maley, 7 Cir., 125 F. 2d 131, 137. We have recently rejected as untenable the theory that the All Writs Act, 28 U.S.C.A. §1651, may enlarge the territorial jurisdiction of the federal courts. Edgerly v. Kennelly, supra, 215 F. 2d at page 421-422. See also Ahrens v. Clark, 335 U. S. 188, 68 S. Ct. 1443, 92 L. Ed. 1898."

See also *United States v. Kniess*, 251 F. 2d 669 (1958).

Third Circuit.

In *Yodock v. United States*, 196 F. 2d 1018 (1952), the defendant had been brought to trial from another jurisdiction by means of a writ of *habeas corpus ad prosequendum*. *After* sentence he moved to vacate on the ground that the trial court had not acquired jurisdiction over him. The court affirmed the trial court's order denying the motion to vacate on the ground that (p. 1018): "The manner in which his presence was secured did not affect the power of the court to try him."[6] But as to the validity of the extraterritorial writ of *habeas corpus ad prosequendum*, the court said (*ibid*):

> "It may be conceded that the writ was improperly issued to a custodian outside the Middle District of Pennsylvania."

A noteworthy District Court decision of the Third Circuit, and one which has not been overruled or criticized,

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[6] *Cf.* this Court in *Frisbie v. Collins*, 342 U. S. 519.

but on the contrary has been cited with approval and followed[7] is *Phillips v. Hiatt*, 83 Fed. Supp. 935 (D. Del. 1949).[8] In that case a defendant in a criminal action pending before the Delaware Federal Court was incarcerated in the Federal Penitentiary at Atlanta, Georgia. Claiming the right to a speedy trial under the 6th Amendment, the defendant moved the court for a writ (though not so denominated) of *habeas corpus ad prosequendum*. The court thus posed the question (pp. 936-937):

> "The question in this case is whether a United States District Court has the power or jurisdiction to issue a writ of habeas corpus or other writ in the nature thereof on behalf of a person confined in a federal penitentiary outside the territorial limits of such court under a sentence imposed by another United States District Court, when the purpose of the writ is to have the prisoner brought within the territorial jurisdiction of the issuing court to stand trial on a new and different charge."

In answering the question in the negative, the court exhaustively discussed the matter. For example (p. 938):

> ". . . (A)ssuming that petitioner's counsel are correct in that the relief sought by petitioner may properly be granted under Section 1651, still such relief may not be granted by this court for the very

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[7] *Edgerly v. Kennelly*, 215 F. 2d 420, 422 (C. A. 7, 1954), cert. den. 348 U. S. 938; *In re Van Collins*, 160 Fed. Supp. 165, 167 (D. Me. 1958); and see *United States v. Coles*, 88 Fed. Supp. 150, 151, n. (D. Ore. 1949).

[8] In the oral argument before this Court in *Nelson v. County of Los Angeles*, No. 152, Oct. Term 1959, ... U. S. ....., 4 L. Ed. 2d 494, one of the Justices chided counsel for petitioners for not citing or relying upon pertinent District Court cases. Counsel do not intend to make the same mistake here.

same reason that relief may not be granted under Section 2241, viz., that the order of this court may not run beyond its territorial jurisdiction.

"Under general provisions of law, a United States District Court cannot issue process beyond its territorial limits. Georgia v. Pennsylvania R. Co., 1945, 324 U. S. 439, 467-468; 65 S. Ct. 716, 89 L. Ed. 1051. A specific exception by Congress is a prerequisite to the extension of the district court's jurisdiction beyond their respective territorial limits. . . ."

And it concluded its opinion (p. 940):

"Irrespective of the desire of this court to secure to petitioner what may be deemed to be substantial constitutional rights, the lack of jurisdiction in the court compels a dismissal of the petition."

First Circuit.

Here again we rely upon an untampered with District Court decision,[9] *In the Matter of Karol Van Collins,* 160 Fed. Supp. 165 (D. Me. 1958). The situation there was essentially the same as in *Phillips v. Hiatt, supra,* the defendant seeking to be brought before the court for trial by means of a writ of *habeas corpus ad prosequendum.* In denying the writ, the court said (pp. 166-167):

". . . There is nothing in §1651 specifically giving to district courts the power to issue writs thereunder beyond their respective territorial limits. It follows, therefore, that this Court is without jurisdiction under §1651 to grant the relief sought for the same reason that it may not grant relief under §2241, viz., that the order of this Court may not run beyond its territorial jurisdiction. . . ."

[9]See footnote 8, *supra.*

Accordingly it follows that this is a proper case for the granting of certiorari under this Court's Rule 19(1)(b) (1st phrase).[10]

II.

The Decision of the Court Below Has Decided an Important Question of Federal Law, Namely That the District Courts Have Extraterritorial Jurisdiction to Issue Writs of Habeas Corpus ad Prosequendum. This Question Has Not Been, but Should Be, Settled by This Court.

It is manifest that whether the District Courts have jurisdiction to issue extraterritorial writs of *habeas corpus ad prosequendum* is an important question of federal law. That this Court considers important the question of the territorial power of the District Courts to issue writs is seen from its grant of certiorari in *Ahrens v. Clark*, 335 U. S. 188 and *United States v. Hayman*, 342 U. S. 205.

Moreover, just this term, this Court again demonstrated its interest by its handling of *De Simone v. United States*, No. 202, October Term, 1959, an *ad testificandum* matter on all fours with the case at bar including incarceration in New York and invoking a writ from the same District Court and a petition for writ of certiorari to the same Circuit Court of Appeals.

In that case, after the court below had dismissed the appeal from the order denying the motion to quash the

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[10]In the light of the District of Columbia Circuit's ruling in *Taylor v. McGrath*, 194 F. 2d 882 (1952), the view of that circuit is not clear. The Court in *Phillips v. Hiatt*, *supra*, was of the opinion that even before the *Taylor* case, the District of Columbia court had overruled earlier decisions which seemed to have sustained extraterritorial jurisdiction (83 Fed. Supp. at 939-940).

writ as frivolous, De Simone filed a petition for writ of certiorari with this Court. In response thereto the Government suggested mootness, but was not content to rely thereon and argued the merits to the effect that the District Court had extraterritorial jurisdiction (pp. 2 and 3, Memorandum for the United States Suggesting Mootness).

In response thereto, this Court issued an interesting order (361 U. S. 873) not accepting the Government's statement at its face value and, *sua sponte* challenging that posture of the case. In that order it asked for the Government's view as to whether any of the orders of the courts below was still outstanding in that they could "possibly" be made the basis for further contempt proceedings against petitioner. The Government's response was that the writ of *habeas corpus ad testificandum* was not outstanding, and that technically two orders of the District Court were still outstanding but that the Government expected to take no action under them.

Thereupon this Court granted certiorari (361 U. S. 125). This in and of itself is noteworthy in view of the Government's argument on the merits. If the Court had felt there were not a substantial and important question, we suggest it might well have merely denied certiorari and that would have been the end of the matter. But, as seen, it did not deny certiorari; it granted it.

Following the grant of certiorari, the Court also did another unusual thing. It not only vacated the judgment of the Court of Appeals and remanded to the District Court, with instructions to dismiss as moot, as is usually done (*cf. Brotherhood of Firemen & Engineers v. Toledo, etc., Grain Co.*, 332 U. S. 748; *Securities & Exchange Commission v. Long Island Plating Co.*, 325 U. S.

833), but it went further and vacated *all* orders *including* the order of the District Court denying the motion to quash the writ of *habeas corpus ad testificandum*, thus leaving for another day, this case we suggest, for a determination of the question.

Finally, it should be brought to the attention of this Court, that in the instant case, even though the trial court denied the motion to quash the writ, it expressed the view that the question is one which might well be decided by this Court. Thus the trial court said [R. III, 2]:

> "The motion is denied. In peremptorily denying it, I do not mean that it isn't worthy of discussion. I think this is a question which should go to the Court of Appeals. It is perhaps a question upon which the Supreme Court should be given an opportunity to adjudicate."

Accordingly, we submit, this is a proper case for the granting of certiorari under this Court's Rule 19(1)(b) (3rd phrase).

III.

The Decision Below Has Decided a Federal Question, Namely, That District Courts Have Extraterritorial Jurisdiction to Issue Writs of Habeas Corpus ad Prosequendum, in a Way Which Conflicts With This Court's Decisions in Ahrens v. Clark, 335 U. S. 188 and United States v. Hayman, 342 U. S. 205.

Ahrens v. Clark, 335 U. S. 188, holds squarely that a District Court under 28 U. S. C., 2241 has no jurisdiction to issue an extraterritorial writ of *habeas corpus*. The court below holds that *Ahrens* is not in point because the writ in that case was *ad subjiciendum* while

the writ involved here is *ad prosequendum* and that there is a difference in the function of the two.

But, we respectfully suggest, there is nothing in either *Ahrens* or section 2241 which even remotely permits of a holding that there is any *territorial* difference between the two.[11] The phrase "within their respective jurisdictions" appearing in Subdivision (a) of 2241 applies to the *whole* statute, (c)(5),[12] as well as (c)(3).[13] The holding of the court below to the contrary flies full force in the face of this Court's decision in *Ahrens* as well as of 2241 itself. Moreover, "the statutory scheme" before the court and considered by it, in *Ahrens* (335 U. S. at 190), is precisely that which is before the Court here and overlooked by the court below. All the 1948 revision, which resulted in 28 U. S. C., 2241, did was to combine the previous 28 U. S. C. (1940 Ed.), 451, 452 and 453 and put in one statute what had formerly been in three. Thus, the "within their respective jurisdictions" limitation which was present in Section 452, must also be considered to have applied to Section 453, which is essentially that portion of today's Section 2241 which is found in subsection (c) thereof. The meaning attributed by the court below [R. III, 6, n. 1] to the elimination by Section 2241 of the words "for the purpose of inquiring into the cause of restraint of liberty" formerly in Section 452 does not follow. Subsection 5

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[11] *Cf. In re Van Collins* (D. Me. 1958), 160 Fed. Supp. 165, 166, note 1: "The writ of habeas corpus ad prosequendum is merely one variant of the common law writ of habeas corpus, the phrase 'ad prosequendum' being simply the designation of the purpose for which the writ is sought." (Citing cases by this Court.)

[12] To bring into court to testify or for trial.

[13] In custody in violation of the Constitution or laws or treaties of the United States.

of subsection (c) of Section 2241 reads that "the writ of habeas corpus (without the words above quoted) shall not extend to a prisoner unless (I)t is necessary to bring him into court to testify or for trial." Therefore it is not correct to say, as does the court below, that the words "habeas corpus," as used in Section 2241 (and as used in former Section 453) means only a proceeding inquiring into the cause of restraint of liberty. To so read the words is to read subdivision (5) of subsection (c) right out of the statute.

The quotation by the court below [R. III, 7] from *Ponzi v. Fessenden*, 258 U. S. 254, 264, is inapposite. Petitioner does not claim that he is immune from a second prosecution. His point is the very basic one that a federal (or, indeed, any) court must obey the law in issuing its orders and that an order issued by a court which is, as we say, beyond and in excess of its jurisdiction cannot be permitted to stand.

The court below next holds that there is extraterritorial, jurisdiction to issue the writ under 28 U. S. C., 1651 (the "all writs" statute). This, the court says is so by virtue of this Court's decision in *United States v. Hayman*, 342 U. S. 205. The court's reasoning is that the trial court has jurisdiction over the offense and over petitioner and therefore the writ is in aid of that jurisdiction. But this reasoning proves too much and the *Hayman* case holds no such thing. If accepted, it would mean that the territorial jurisdiction of the District Courts would be completely obliterated and those courts would, in effect, be but one nationwide court just because the court has jurisdiction of the case. Before so revolutionary a concept can be attributed to Congress or accepted, certainly Congress would have said so.

Rather than being "illustrative" of the fact that the District Courts have extraterritorial jurisdiction to issue writs of *habeas corpus ad prosequendum*, the two rules of criminal procedure cited by the court below [4(c)(2) —warrants; and 17(e)(1)—subpoenas,] are precisely illustrative of the contrary. They show that unless Congress (in these instances, through the rule making authority of this Court) wants to give the District Courts extraterritorial jurisdiction, those courts simply do not have it. The revisor's notes to Rule 4(c)(2) say:

> "This rule and Rule 9(c)(1) modify the existing practice under which a warrant may be served only within the district in which it is issued. Mitchell v. Dexter, C. C. A. 1, 1917, 244 F. 926; Palmer v. Thompson, 1902, 20 App. D. C. 273; . . ."

The rules enlarged the territorial jurisdiction of the district courts as to warrants and subpoenas only. There are "specific exceptions" as to them. The rule changes did not, however, nor do they purport to, enlarge the jurisdiction of the court with respect to writs of *habeas corpus ad prosequendum*.

No extraterritorial jurisdiction is breathed into 28 U. S. C. 1651(a) by virtue of the fact, relied upon by the court below [R. III, 7], that the district court has jurisdiction over the offenses and over the defendant. The same jurisdiction was present in *Palmer v. Thompson* (1902), 20 App. D. C. 273, where the defendant had already been tried and found guilty in the Eastern District of Tennessee and was wanted back from the District of Columbia for sentencing. At that time (1902) the "all writs

statute" was then too in the law [R. Supp. 716][14] and read essentially the same way as it does today.[15]

So also did the Eastern District of Wisconsin have "jurisdiction" over the cause and the defendant in *Mitchell v. Dexter*, 244 Fed. 926 (C. C. A. 1, 1917). But this, nor the then "all writs statute" (see f.n. 14 and 15, *supra*), did not enlarge the territorial jurisdiction of the Wisconsin court to issue its writ of arrest for effectuation in Massachusetts. The court said (244 Fed. at 930):

> "The Court of Appeals for the District of Columbia, in Palmer v. Thompson, 20 App. D. C. 273, expressly held that, in the absence of an act of Congress conferring the power, the federal court in one district had no authority in a criminal case to issue its writ to the marshal of another federal district, commanding him to arrest a person within his jurisdiction, but outside that of the court issuing the writ, and that such power was not conferred by section 716 of the Revised Statutes. . . .
>
> "Furthermore, we do not think section 262 of the Code (R. S. §716; Judiciary Act Sept. 24, 1789, c. 20, §14, 1 Stat. 73) gives authority to a federal District Court to issue processes to run beyond the limits of the territory in which it is established, but rather that it is a designation of the form or char-

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[14]And had been since 1789 (1 Stat. 81; Act of Sept. 24, 1789, Ch. 20, Sec. 14.

[15]"The Supreme Court and the circuit and district courts . . . shall have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law." The addition of the words in 1651(a) "or appropriate" and the change of the words "in aid" from "for the exercise" did not, we submit, effect any change of meaning.

acter of writs which such court may issue within the territory where it is established. Hills & Co. v. Hoover, 220 U. S. 329, 336, 337, 31 Sup. Ct. 402, 55 L. Ed. 485, Ann. Cas. 1912C, 562; McClellan v. Carland, 217 U. S. 269, 279, 30 Sup. Ct. 501, 54 L. Ed. 762."

Accordingly the fact that the district court has jurisdiction over the cause and the defendant, does not enlarge its territorial jurisdiction. Where extraterritoriality is desired, Congress and this Court (through its rule making power) says so.

And, of course, the fact that as to some matters (subpoenas and warrants) the district courts have been given extraterritorial jurisdiction does not mean that in other respects (here, writs of *habeas corpus ad prosecuendum*) the jurisdiction is likewise enlarged. To so hold would set at naught the need for "specific exceptions" to the territorial rule (*Ahrens v. Clark*, 335 U. S. at 190).

The court below misreads, we respectfully suggest, this Court's opinion in *Hayman*. In *Hayman* this Court was careful to make very clear that it was not modifying or making inroads on *Ahrens*, or enlarging the territorial sweep of the writ of habeas corpus. Thus the Court said (342 U. S. at 220):

". . . *This is not a habeas corpus proceeding.* The sentencing court in the Southern District of California would not be issuing an original writ of habeas corpus to secure respondent's presence in another district. Issuance of an order to produce the prisoner is auxiliary to the *jurisdiction* of the trial court over respondent *granted in Section* 2255 itself and invoked by respondent's filing of a motion under that Section." (Italics added).

As we understand Hayman, it is this:

Prior to the enactment of 28 U. S. C., 2255, when a prisoner desired to test the validity of the sentence which had been imposed upon him, he filed habeas corpus proceedings in the district in which he was confined. Because of the territorial limitation of habeas corpus, the prisoner could not file such proceedings in the district in which he had been sentenced. The result was that there arose the practical difficulty of holding the hearing in the district of the prisoner's confinement, thus requiring the bringing of witnesses, records, etc. from the district in which defendant had been sentenced. To meet these difficulties section 2255 was enacted, and by its provisions:

1. The defendant was given the right to file his motion in the district court in which he had been sentenced
2. The district court in that district was given the jurisdiction to hold the hearing in that district; and
3. That district court was given the authority—by the statute itself—to produce the prisoner at the hearing, even though he be confined in another district.

In other words, Congress had made a specific exception to the rule that the power of the district courts to issue writs is limited to the territorial jurisdiction of said courts. This exception was found by this Court in Section 2255 itself.

But the statutes (18 U. S. C., 1951, 875(b) and 371) under which the trial court in the case at bar has jurisdiction over the offenses and the defendant do not, either

expressly or by implication, extend the territorial jurisdiction of the trial court. Hence 28 U. S. C. 1651(a) cannot enlarge that jurisdiction. And the statute (28 U. S. C., 2241) which gives the Court jurisdiction to issue the writ altogether is, as *Ahrens* makes clear, limited territorially.

The concern of the Court below that a decision upholding petitioner's contention would mean that the District Courts would be impotent to bring a prisoner to trial from another district, is unnecessary. Petitioner only claims that the court cannot exceed its jurisdiction and that if Congress wants to make habeas corpus jurisdiction extraterritorial, it knows how to, and can, do so. As has been said: "The objection to judicial restraint of an unauthorized exercise of power is not weighty." (*Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U. S. 123, 157, concurring opinion).

It seems clear, therefore that the decision of the court below is in direct conflict with this Court's decision in *Ahrens* and that the court below misunderstood the meaning of this Court's ruling in *Hayman*. Accordingly this is a proper case for the granting of certiorari under this Court's Rule 19(1)(b) (4th phrase).

Conclusion.

The petition for writ of certiorari should be granted.

Respectfully submitted,

A. L. WIRIN,

FRED OKRAND,

Attorneys for Petitioner.

WILLIAM B. BEIRNE,

Of Counsel.

APPENDIX "A."

Opinion of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals for the Ninth Circuit.

Paul John Carbo, Appellant, vs. United States of America, Appellee. No. 16,820.

Filed March 23, 1960.

On Appeal from the United States District Court for the Southern District of California, Central Division.

Before: Stephens, Pope and Hamlin, Circuit Judges.

Per Curiam:

A 10-count indictment was returned by the Grand Jury in the Southern District of California, Central Division, on September 22, 1959, charging Paul John Carbo, aka Frankie Carbo, hereinafter appellant, and four others with violations of 18 U.S.C.A. §§1951, 875(b) and 371. Appellant posted bond at Baltimore, Maryland, returnable to the United States District Court at Los Angeles in the sum of $100,000.00. Thereafter, but prior to his appearance in Los Angeles upon the charges contained in the indictment filed there, appellant was charged with and pleaded guilty to three misdemeanor counts in New York City, New York, and was sentenced to two years in prison and fined. During appellant's New York confinement in prison, the New York authorities honored a writ of habeas corpus ad prosequendum issued by the District Court for the Southern District of California and permitted appellant to appear in said court at Los Angeles to answer to the charges in the indictment. On December 2, 1959, when he appeared in said Court, he was arraigned on the charges contained in the indictment, and stated that he had posted a $100,000.00 bond. On December 8, in

said District Court, the defendant requested permission to enter his plea and be permitted to return to New York and later return to Los Angeles for trial. Appellant entered a plea of not guilty to counts 1, 3, 5, 7 and 9 of the indictment, and the Court then set the case against all defendants for trial on March 29, 1960, and at appellant's request directed that he be returned to New York for the purpose of obtaining counsel and be returned to the Southern District of California in time for trial.

On March 16, 1960, after application by the United States Attorney, the District Judge in said district directed the issuance of a document entitled "Habeas Corpus Ad Prosequendum" directed to the jailer of New York City Prison, Bellevue Hospital, New York City, New York, commanding him to produce the appellant in the District Court for his trial upon March 29, 1960. Appellant filed in said District Court a motion to quash said writ and the United States Attorney filed an opposition to such motion. After hearing, the District Court denied appellant's motion to quash.

Appellant thereupon appealed to this Court from said order of denial.

On March 22, 1960, after a motion to dismiss said appeal had been filed by the United States Attorney, counsel for the appellant and the United States filed memoranda of authorities and orally argued the matter before this Court. It was stipulated by counsel for appellant and for the United States that the appeal itself might be deemed submitted to this Court for decision upon the merits, upon the record as filed and the briefs and memoranda of the parties on file with the Court, and without further briefs or argument, and this Court so ordered.

Appellant contends that the District Court had no jurisdiction to issue the writ in question, because the appellant is in custody in New York out of the territorial jurisdiction of the District Court.

Appellant relies upon *Ahrens v. Clark*, 335 U. S. 188, decided June 21, 1948. In that case, the petitioners were confined in New York and the petitions for habeas corpus alleging the illegal restraint of their liberty in New York were filed in the District Court of the District of Columbia.

The statute there under consideration by the Court then provided (28 U.S.C. 452):

"The several justices of the Supreme Court and the several judges of the circuit courts of appeal and of the district courts, within their respective jurisdictions, shall have power to grant writs of habeas corpus *for the purpose of an inquiry into the cause of restraint of liberty.* A circuit judge shall have the same power to grant writs of habeas corpus within his circuit, that a district judge has within his district; and the order of the circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had." [Emphasis ours.][1]

The Court stated at page 190:

"The question at the threshold of the case is whether the words 'within their respective jurisdictions' limit the district courts to inquiries into the *causes of restraints*

---

[1]The successor to this section is 28 U.S.C. 2241. The reviser's notes to this section state:

"Words 'for the purpose of an inquiry into the cause of restraint of liberty' in section 452 of Title 28, U.S.C., 1940 ed., were omitted as merely descriptive of the writ."

of liberty of those confined or restrained within the territorial jurisdictions of those courts." [Emphasis ours.]

In the instant case there is no question before the Court of any illegal restraint of liberty. The appellant does not complain that he is illegally restrained by any authority. His only objection is his contention that the United States District Court cannot by its order arrange to have him brought from New York to Los Angeles for trial upon charges contained in an indictment on file in the District Court there. The *Ahrens* case is not in point.

There is a distinction between the writ of habeas corpus ad subjiciendum which was under consideration in the *Ahrens* case and the writ of habeas corpus ad prosequendum which is under consideration in this case. Price v. Johnston, 334 U. S. 266, at 281.[2]

The purpose of the writ of habeas corpus ad subjiciendum (sometimes called The Great Writ) is to inquire as to the legality of the prisoner's restraint. It was this writ that the Supreme Court was discussing in *Ahrens*.

The writ of habeas corpus ad prosequendum has an entirely different purpose. The legality of the prisoner's restraint is not in question. It is issued "when it is necessary to remove a prisoner . . . in order to . . . be tried in the proper jurisdiction wherein the fact was

---

[2]Black's Law Dictionary, 4th Ed. 1957, contains the following at page 837:

HABEAS CORPUS. Lat. (You have the body.) The name given to a variety of writs, (of which these were anciently the emphatic words,) having for their object to bring a party before a court or judge. In common usage, and whenever these words are used alone, they are understood to mean the *habeas corpus ad subjiciendum*, (see infra). Dancy v. Owens, 126 Okl. 37, 258 P. 879, 884; In re McDavitt, 101 Misc. 588, 168 N.Y.S. 433; U.S. v. Tod, 263 U.S. 149, 44 S.Ct. 54, 57, 68 L.Ed. 221; Payne v. Graham, 20 Ala. App. 439, 102 So. 729, 731.

committed." Price v. Johnston, *supra*. That this should be done is indicated by the language of the Supreme Court in Ponzi v. Fessenden, 258 U. S. at 264, where it is said:

"The authorities, except when special statutes make an exception are all agreed that the fact that a defendant in an indictment is in prison serving a sentence for another crime gives him no immunity from the second prosecution. . . . Delay in the trial of accused persons greatly aids the guilty to escape because witnesses disappear, their memory becomes less accurate and time lessens the vigor of officials charged with the duty of prosecution. If a plea of guilty and imprisonment for one offense is to postpone trial on many others it furnishes the criminal an opportunity to avoid the full expiration of his crimes."

Respondent contends that the District Court had power to issue the writ in question under 28 U.S.C.A. §1651(a), which reads as follows:

The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

The District Court had jurisdiction of the offense charged against the defendant-appellant and of the appellant himself. After his arrest he had given a bond conditioned upon his appearance in the District Court at appropriate times; he had appeared in the District Court in answer to the charge against him; had entered a plea of not guilty; and had consented to a trial date being set. At his request, he was permitted to return to New York pending his trial.

Under §1651 the District Court had the power to issue all writs necessary or appropriate in aid of its jurisdic-

tion. As illustrative of the fact that the power of the District Court may extend beyond its territorial limits, attention may be called to two rules of the Federal Rules of Criminal Procedure, which have the force of law.

Under Rule 4 of the F.R.C.P., providing for warrants of arrest, subdivision (c)(2) provides: "The warrant may be executed . . . at any place within the jurisdiction of the United States."

Under Rule 17 F.R.C.P., providing for the attendance of witnesses, subdivision (e)(1) provides: "A subpoena requiring the attendance of a witness at a hearing or trial may be served at any place within the United States." These rules make it plain that the jurisdiction of a District Court for certain purposes is not limited to the territorial jurisdiction of that Court.

In United States v. Hayman, 342 U. S. 205, the Supreme Court had occasion to consider the power of a District Court in a section 2255 proceeding. In holding there that the District Court had the power to order the presence of a prisoner who was confined in another district, the Supreme Court said:

"The very purpose of Section 2255 is to hold any required hearing in the sentencing court because of the inconvenience of transporting court officials and other necessary witnesses to the district of confinement. The District Court is not impotent to accomplish this purpose, at least so long as it may invoke the statutory authority of federal courts to issue 'all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.' An order to secure respondent's presence in the sentencing court to testify or otherwise prosecute his motion is 'necessary or

appropriate' to the exercise of its jurisdiction under Section 2255 and finds ample precedent in the common law."

We believe that in this case the District Court is not impotent to bring before it for trial a defendant who has been indicted by that Court, who has entered a plea of not guilty in that Court, and who at his request has gone to the State of New York, and whose presence is now required in the Southern District of California for the purpose of proceeding with the prosecution against him.

We hold that the writ issued in this case by the District Court was proper under 28 U.S.C.A. §1651(a) as being necessary and appropriate in aid of its jurisdiction.

Judgment affirmed.

Appellant has also presented a motion for leave to file a petition for a writ of mandamus directed to the District Court to quash the issued writ and a motion to stay enforcement of the issued writ. Each of said motions is denied.

(Endorsed) Per Curiam Opinion Filed Mar. 23, 1960.

FRANK H. SCHMID, *Clerk.*

APPENDIX "B."

United States Court of Appeals, for the Ninth Circuit.

Paul John Carbo, Appellant, vs. United States of America, Appellee. No. 16,820.

Appeal from the United States District Court for the Southern District of California, Central Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California, Central Division, and on motion of Appellee to dismiss appeal, and motion of Appellant for stay of proceedings, and petition of Appellant for leave to file petition for writ of mandamus, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is affirmed, that the motion for stay of proceedings, be, and hereby is denied, and that the motion for leave to file petition for writ of mandamus, be, and hereby is denied.

(Endorsed) Filed and entered March 23, 1960.

FRANK H. SCHMID, *Clerk.*

APPENDIX "C."

In the United States District Court, Southern District of California, Central Division.

United States of America, Plaintiff, vs. Paul John Carbo, *et al.*, Defendants. No. 27973-CD.

Order.

The above cause having come on for hearing on March 28, 1960, the United States appearing by Robert John Jensen, Chief, Criminal Division, Assistant United States Attorney and Charles A. Lynberg, Assistant United States Attorney and the defendant Paul John Carbo appearing by his attorneys William B. Beirne and A. L. Wirin, it appearing that because of the illness of the said defendant Paul John Carbo and the performance upon him of a kidney operation on March 25, 1960, that it is improvident to transport said defendant from the New York City Prison, Bellevue Hospital, New York City to Los Angeles, California for trial on or before March 29, 1960, the date presently set for the trial of the above cause, and the Court having continued said trial date of said cause until July 12, 1960, and good cause appearing therefor:

1. It is ordered and adjudged that the Order of the Court dated March 16, 1960 ordering that a Writ of Habeas Corpus ad Prosequendum issue as prayed for in the application dated March 16, 1960, of the United States Attorney, is continued in full force and effect.

2. The order and Judgment of the Court dated March 16, 1960, denying said defendant's Motion to Quash said Writ of Habeas Corpus ad Prosequendum remains in full force and effect.

3. The execution of said Order of March 16, 1960 ordering that a Writ of Habeas Corpus ad Prosequendum issue as heretofore prayed for herein is continued, and the enforcement and execution of the Writ of Habeas Corpus ad Prosequendum issued by the Clerk of this Court on March 16, 1960 pursuant to the aforesaid Order, is continued and stayed in the following respects: said writ shall be executed on or after June 24, 1960; said defendant shall be transported from the New York City Prison, Bellevue Hospital, New York City to Los Angeles, California for trial, pursuant to said Writ, between June 24 and June 27, 19 0, the defendant to be brought to Los Angeles by June 27, 1960 during said period between June 24 and June 27, 1960.

The Clerk shall issue an Amended Writ of Habeas Corpus ad Prosequendum pursuant to the foregoing Order.

DATED: This 28th day of March, 1960.

Ernest A Tolin

ERNEST A. TOLIN,

United States District Judge.

Approved as to form:

ROBERT JOHN JENSEN,

Of Counsel for the United States.

APPENDIX "D."

United States District Court, Southern District of California, Central Division.

United States of America, Plaintiff, vs. Paul John Carbo, aka Frankie Carbo, *et al.*, Defendant. No. 27973, Criminal.

Amended Writ of Habeas Corpus ad Prosequendum, Being an Amendment to the Writ of Habeas Corpus ad Prosequendum Issued.

Filed March 16, 1960.

The President of the United States of America.

To: The Warden, Sheriff or Jailor of New York City Prison, Bellevue Hospital, New York, New York.

Greeting:

We command that you produce and deliver the body of Paul John Carbo, aka Frankie Carbo now in your custody before the Honorable Ernest A. Tolin, Judge of the United States District Court, Second Floor, United States Post Office and Courthouse, 312 North Spring Street, Los Angeles, on July 12, 1960, at the hour of 10:00 a.m., in order that said defendant in the above-entitled case may then and there be tried at said time and place, and also at such other times as may be ordered by the said court, and have you then and there this writ.

The delivery of the body of said Paul John Carbo, aka Frankie Carbo to the Courtroom of said United States District Court, as aforesaid, and the return by you of said defendant to your custody shall be deemed sufficient compliance with the writ.

The enforcement and execution of the foregoing writ of Habeas Corpus ad Prosequendum is continued and

stayed in the following respects: this Writ shall be executed on or after June 24, 1960; said defendant shall be transported from the New York City Prison, Bellevue Hospital, New York City to Los Angeles, California for trial, pursuant to said Writ, between June 24 and June 27, 1960, the defendant to be brought to Los Angeles by June 27, 1960 during said period between June 24 and June 27, 1960.

Witness the Honorable Ernest A. Tolin, Judge of the United States District Court for the Southern District of California.

Dated: March 30, 1960.

Clerk, United States District Court,
Southern District of California,

By EDW. F. DREW,
Deputy Clerk.

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Office-Supreme Court, U.S.
FILED
MAY 13 1960
JAMES R. BROWNING, Clerk

No. 675 72

In the Supreme Court of the United States

OCTOBER TERM, 1959

PAUL JOHN CARBO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,

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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 875

PAUL JOHN CARBO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Vol. III, 4-9) is not yet reported.[1]

JURISDICTION

The judgment of the court of appeals was entered on March 23, 1960. The petition for a writ of certiorari was filed on April 20, 1960. The jurisdiction of the Court is invoked under 28 U.S.C. 1254(1).

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[1] The record consists of four volumes, each of which is separately paginated. Our record references will cite the respective volume numbers.

QUESTION PRESENTED

Whether the court below properly refused to quash a writ of *habeas corpus ad prosequendum* issued by a district court, addressed to state custodial officials outside the district, ordering them to produce the petitioner, a state prisoner, for trial in the federal district court.

STATUTES INVOLVED

28 U.S.C. 1651 provides in pertinent part:

> (a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.
>
> * * * *

28 U.S.C. 2241 provides in pertinent part:

> (a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.
>
> * * * *
>
> (c) The writ of habeas corpus shall not extend to prisoner unless:
>
> (1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or,

(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or,

(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or

(4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or,

(5) It is necessary to bring him into court to testify or for trial.

STATEMENT

A ten count indictment returned on September 22, 1959, in the district court for the Southern District of California charged the petitioner and four others with extortion and conspiracy, in violation of 18 U.S.C. 875 and 1951 (Vol. I, 2-16). The petitioner was arrested in Baltimore, Maryland, where he posted bond returnable to the district court for the Southern District of California sitting in Los Angeles. Prior to appearing in Los Angeles, the petitioner pleaded guilty to three misdemeanor charges in New York City, and was sentenced to serve a two year term of imprisonment and to pay a fine. The authorities at the New York City Prison honored a writ of *habeas corpus ad prosequendum* from the California district

court, and the petitioner appeared before the district court there on December 2 and 8, 1959, where he pleaded not guilty to the indictment (Vol. I, 18-19). The trial date was set for March 29, 1960, and the district court granted the petitioner's request to return to New York in order to obtain counsel (Vol. I, 19).

On March 16, 1960, the district court issued a writ of *habeas corpus ad prosequendum* to the Warden of the New York City Prison, directing that the petitioner be returned to Los Angeles for trial on March 29, 1960 (Vol. I, 28, 33A). The petitioner's motion to quash the writ was denied on the same day (Vol. II, 2). On appeal, the court of appeals unanimously affirmed this order (Vol. III, 9, 10). In view of the fact that the petitioner underwent a medical operation, the district court subsequently amended the return date of the writ to June 27, 1960, with the petitioner to be transported from New York to California after June 24th (Pet. App. "C" and "D"). The petitioner is scheduled to be tried with his co-defendants in the district court on July 12, 1960.

ARGUMENT

The sole question raised by the petition for a writ of certiorari is the power of the District Court for the Southern District of California to bring before it for trial a prisoner held by state officials in New York. At an earlier stage of this proceeding, the petitioner raised a question as to the propriety of bringing him to trial because of his illness. No such

issue is presently involved. The petitioner's trial has been postponed and there is no present question as to his ability to stand trial in July—an issue which in any event would be for the district court.

1. The petitioner's attack on the jurisdiction of the district court to issue the writ is without merit. The writ of *habeas corpus ad prosequendum* is the traditional method used for bringing a person already serving a sentence before a court for trial. *Barrett* v. *United States*, 270 F. 2d 772, 776 (C.A. 8); *United States ex rel Moses* v. *Kipp*, 232 F. 2d 147, 150 (C.A. 7); *Gunton* v. *Squier*, 185 F. 2d 470, 471 (C.A. 9); *Lunsford* v. *Hudspeth*, 126 F. 2d 653, 655 (C.A. 10); *Downey* v. *United States*, 91 F. 2d 223, 227 (C.A. D.C.); *Noble* v. *Botkin*, 153 F. 2d 228 (C.A. D.C.); 3 Blackstone, *Commentaries* 129-130; Black, *Law Dictionary* (4th Ed.) 837. Cf. *Price* v. *Johnston*, 334 U.S. 266, 281-284; *Ponzi* v. *Fessenden*, 258 U.S. 254, 261-262; *Ex parte Bollman*, 4 Cranch 75, 98. Just as a district court has the authority under 28 U.S.C. 1651(a), *supra*, p. 2, to issue an order for the production of a prisoner confined outside its territorial jurisdiction in a Section 2255 proceeding (*United States* v. *Hayman*, 342 U.S. 205, 221), the court also has the authority under 28 U.S.C. 1651(a), *supra*, to issue the writ of *habeas corpus ad prosequendum* to operate outside of its territorial jurisdiction. In each situation, the district court has jurisdiction of the subject matter (over the 2255 proceeding in one case, and the crimes charged in the indictment in the other) and is issuing process in aid of this jurisdic-

tion.[2] The present case is an even stronger one than

[2] The petitioner attempts (Pet. 6, 13-15) to draw an analogy to *Ahrens* v. *Clark*, 335 U.S. 188, by arguing that the authority of the district courts to issue writs of *habeas corpus ad prosequendum* derives from 28 U.S.C. 2241 (c) (5), *supra* p. 3, that that statute is the successor of 28 U.S.C. 452 (1940 Ed.), and that, since this Court construed 28 U.S.C. 452 in *Ahrens* to limit the authority to issue writs of *habeas corpus ad subjiciendum*, it follows that the courts' authority to issue writs of *habeas corpus ad prosequendum* is limited to their respective territorial jurisdictions. But 28 U.S.C. 2241 deals only with writs of *habeas corpus ad subjiciendum* since the words, "for the purpose of an inquiry into the cause of restraint of liberty", found in former Section 452, were omitted, not to amend its substance, but as merely descriptive of the writ involved. Reviser's Note, 28 U.S.C., p. 5079, following Section 2241. Subsection (c) (5) of Section 2241 refers, therefore, to a special category of prisoners who may invoke the aid of writs of *habeas corpus ad subjiciendum;* the subsection is not, as the petitioner asserts (Pet. 15), read out of the statute by the above construction.

The petitioner's reliance on *Edgerly* v. *Kennelly*, 215 F. 2d 420 (C.A. 7), certiorari denied, 348 U.S. 938, and *Goldberg* v. *Hoffman*, 225 F. 2d 463 (C.A. 7), is misplaced. *Edgerly*, a civil suit for damages, in which the subpoena power is more limited, and *Goldberg*, a mandamus proceeding, were overruled *sub silentio* by *United States ex rel Moses* v. *Kipp*, 232 F. 2d 147, 150 (C.A. 7), to the extent that they held that the district courts lacked the authority under 28 U.S.C. 1651(a) to issue writs beyond their respective territorial jurisdictions. Nor does *United States* v. *Kniess*, 251 F. 2d 669 (C.A. 7), help the petitioner. In that case, the court correctly held that it lacked the authority to issue a writ of *habeas corpus ad subjiciendum* beyond its territorial jurisdiction. In *Taylor* v. *McGrath*, 194 F. 2d 882 (C.A. D.C.), on which the petitioner also relies, the court merely held that mandamus was not a substitute for *habeas corpus*, and that, in any event, the petitioner was not entitled to a writ of *habeas corpus ad subjiciendum* because he was outside of the court's territorial jurisdiction.

Hayman, for the long history of the use of *habeas corpus* in these circumstances even more clearly falls within the requirement of Section 1651(a) that it be "agreeable to the usages and principles of law."

In both *Phillips* v. *Hiatt*, 83 F. Supp. 935 (D. Del.), and *In the Matter of Karol Van Collins*, 160 F. Supp. 165 (D. Me.), on which the petitioner relies, the *habeas corpus* proceedings were initiated by the prisoners involved in attempts to secure a speedy trial before the termination of sentences they were already serving. In denying relief, the court considered the request as similar to an inquiry into the legality of detention under 28 U.S.C. 2241(c)(5) and, accordingly, as limited by the territorial restrictions of 28 U.S.C. 2241(a) which limits jurisdiction to the district where the restraint occurs. Although some of the language in these cases appears inconsistent with the government's position here, we believe the cases are on their facts not against us, and that, in any event, this Court's decision in *Hayman* is controlling.

As for the reference by the petitioner (Pet. 11-12) to this Court's order in *De Simone* v. *United States*, 361 U.S. 125, it is probably not necessary to point out that the Court did not reach the merits of the case since it became moot by reason of that petitioner's release from custody before the petition was acted upon. This Court was concerned with whether the case was in fact moot and whether the petitioner was still subject to outstanding orders. However, in no respect did this Court's action reach the issue of the authority of the court in California to order the peti-

tioner's custodians in New York to bring him west to testify.

In a criminal case, particularly where a valid indictment is outstanding, a district court of the United States has jurisdiction outside its normal territorial limits. Under Rules 4 and 17, F. R. Crim. P., a court may issue a subpoena or a warrant of arrest to run anywhere in the United States. A writ of *habeas corpus ad prosequendum* is of the same nature since it is a means of bringing a defendant before the court. Thus, there is no extension of jurisdiction by the use of the writ.

2. In addition to the fact that the district court had authority to issue the writ, it appears that the petitioner has no standing to raise the issue. The writ is addressed by the United States District Court for the Southern District of California to the jailer of the New York City prison, in effect the State of New York. The issue of the right of the United States to ask for the delivery of the petitioner in California is a matter between the two sovereigns. *Ponzi* v. *Fessenden*, 258 U.S. 254; *Barrett* v. *United States*, 270 F. 2d 772 (C.A. 8); *United States ex rel Moses* v. *Kipp*, 232 F. 2d 147 (C.A. 7). The petitioner cannot be heard to complain of the procedure employed by one sovereign to secure his attendance for trial from the other sovereign.

CONCLUSION

For the reasons stated, we respectfully submit that the petition for a writ of certiorari should be denied.

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IN THE

Supreme Court of the United States

October Term, 1959

No. ~~575~~ 72

PAUL JOHN CARBO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION.

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IN THE

Supreme Court of the United States

October Term, 1959
No. 875

PAUL JOHN CARBO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION.

Argument.

1. Respondent sweeps with too broad a brush and stops too soon when it says (Reply, pg. 4) that the "question raised by the petition for writ of certiorari is the power of the District Court for the Southern District of California to bring before it for trial a prisoner held by state officials in New York." Omitted from this formulation (cf. petition, pg. 2) is the crucial element as to the power of the District Court to thus exercise extra-territorial jurisdiction by means of the writ of *habeas corpus ad prosequendum.*

Respondent does not gainsay that the question is an important one nor that it has never been decided by this Court (cf. Petition, Point II, pp. 11-13).

Comparable questions are constantly arising. Cf. the filing of April 28, 1960 of petition for writ of certiorari

in *Aristeguieta v. First National Bank of New York*, No. 892, Oct. Term, 1959, this Court, 28 L.W. 3327, where the Court of Appeals for the Fifth Circuit (274 F. 2d 206) *reversed* the Florida District Court which had decided, inter alia, that it had extraterritorial jurisdiction to issue a subpoena duces tecum to a New York bank in connection with an extradition proceeding (28 L.W. 3334). It thus appears that the mere fact the district court "has jurisdiction of the subject matter" (Govt. Reply, pg. 5) does *not* enlarge its territorial jurisdiction. What respondent overlooks in analogizing (Govt. Reply, pg. 5) jurisdiction over a 28 USC 2255 proceeding with jurisdiction over an alleged crime is that section 2255 contains within itself the exception to the general rule as to territorial limitation (see Pet. pg. 19). Not so the mere fact that a court has jurisdiction over an offense. The District Court's jurisdiction over an offense is traditionally territorial, even having constitutional roots (6th Amendment). Accordingly, it takes a specific expression of an exception to the general rule (e.g. § 2255) to enlarge the court's territorial jurisdiction. None can be found merely because a court has jurisdiction over an offense.

We do not believe tenable the Government's position (Reply, pp. 6-7) that 28 USC 2241(c)(5) applies only to the writ of *habeas corpus ad subjiciendum*. In the first place, such a reading flies directly in the teeth of the explicit language of the subsection:

> "The writ of habeas corpus shall not extend to a prisoner unless (I)t is necessary to bring him into court to testify or for trial."

To say that this wording contemplates an inquiry into the cause or legality of detention, is to stand even "congressional English" (*Commissioner of Internal Revenue v. Acker,* ..... U.S. ....., 28 L.W. 4009, 4011, dissenting opinion) on its head.

Moreover, what is now 28 USC 2241(c), including subdivision (5) thereof, was derived from former 28 USC (1940 ed) 453 [R.S. § 753] which did not contain the phrase "for the purpose of an inquiry into the cause of restraint of liberty." The quoted phrase was in former 28 USC (1940 ed) 452 (which was a combination of R.S. 752 and §6 of Ch. 229 of Act of Feb. 13, 1925, 43 Stat. 940). Accordingly it would appear that the Reviser's Note, following 28 USC 2241, is an oversimplification of the meaning to be attributed to the elimination of the quoted phrase when 28 USC (1940 ed) 451, 452 and 453 were combined into the one section 2241. Equally as plausible—or actually, more plausible—an explanation is that by reason of subdivision (c)(5), the words were not accurate or descriptive.

The thrust of *Phillips v. Hiatt,* 83 Fed. Supp. 935 (D. Del. 1949) and *In the Matter of Karol Van Collins,* 160 Fed. Supp. 165 (D. Me. 1958) cannot be blunted on a theory that these cases involved "an inquiry into the legality of detention" (Govt. Reply, 7). A reading of those cases, we submit, permits of no such conclusion. Petitioners in those cases were not complaining that they were illegally detained, nor were they seeking release from custody. Each was simply seeking, each of them being in federal custody, to be brought for trial before a federal district court before which a criminal charge against him

was pending, a district court which, to use respondent's language (Repl. 5), "has jurisdiction of the subject matter . . . , . . . the crimes charged in the indictment." Indeed, the courts specifically considered their power under both 2241(c)(5) and 1651(a)—the latter section being ignored by respondent—and precisely concluded that neither, including 1651(a), enlarged the territorial jurisdiction to issue the writ.

Assuredly, the Government's position is illogical. It means that if the prisoner asks the court to exercise extraterritorial jurisdiction to bring him into court for the purpose of availing himself of the constitutional right to a speedy trial, the court has no such jurisdiction; but if the Government asks for the extraterritorial exercise of power to bring the prisoner to trial on the same charge, the court has jurisdiction. Such a contradictory and capricious view of jurisdiction cannot be permitted. The court's exercise of power is the same in both cases. It either has the power to issue an extraterritorial writ of *habeas corpus ad prosequendum*, or it does not. That power or lack of it does not depend upon which party to the litigation makes the request.

In any event, this discussion demonstrates that the question is so important as to call for review by this Court. The concession by the Government (Reply 7) of the inconsistency of its views with those of the *Hiatt* and *Van Collins* cases furnishes additional reasons for review here.

We do not believe it can properly be said (Govt. Reply, pg. 6) that *U.S. ex rel. Moses v. Kipp*, 232 F. 2d 147 (CA 7) decided so soon (1956) after *Edgerly v. Ken-*

nelly, 215 F. 2d 420 (CA 7 1954) and *Goldberg v. Hoffman*, 225 F. 2d 463 (CA 7 1955), without mention of either, overruled those two cases, even *sub silentio*. The fact is that in the *Moses* case the *jurisdiction* of the District Court to issue an extraterritorial writ of *habeas corpus ad prosequendum* was not questioned. The question involved was whether a prisoner could "insist upon the priority of" a federal over a state conviction (232 F. 2d at 150). Petitioner makes no such contention here. What he does contend for is the lack of *jurisdiction* in the district court to issue an extraterritorial writ of *habeas corpus ad prosequendum* whether addressed to the same or a different sovereignty. The fact that the writ of *habeas corpus ad prosequendum* is a "traditional method for bringing a person already serving a sentence before a court for trial" (Govt. Br. 5), does not, as respondent implies (ibid), solve the problem. In the United States, the power to issue a writ of habeas corpus is statutory. And, as we assert, that power is limited territorially and Congress has not seen fit to make an exception as to the writ of *habeas corpus ad prosequendum*.

Petitioner does not rely (Govt. Repl. pg. 6) upon *Taylor v. McGrath*, 194 F. 2d 882 (CA DC 1952) on the merits. He called that case to the attention of this Court (Pet. 11) to point up that it was not clear what the present view of the District of Columbia Circuit was; that at least one case, *Phillips v. Hiatt*, 83 Fed. Supp. 935, 939-940 (D. Del. 1949) had considered that circuit to have overruled earlier decisions which seemed to have sustained extraterritoriality. If that be so, then on the ground of conflict of circuits along with that shown (Pet.

6-10) as to the Seventh, Third and First, this is a proper case for the grant of certiorari. (Rule 19(1)(b) (1st phrase) of this Court).

The final point made by respondent (Reply, 8) is that a writ of *habeas corpus ad prosequendum* "is of the same nature" as a subpoena or a warrant of arrest which, under Rules 4(c)(2) and 17(e)(1), respectively, Federal Rules of Criminal Procedure, run anywhere in the United States. The writ may or may not be of the same nature as a subpoena or warrant of arrest. But whether it is or not does not assist in the solution of the question. The point is (see Pet. 16) that Congress (through the rule making power of this Court) specifically carved out an exception to the District Court's territorial jurisdiction in the matter of subpoenas and warrants of arrest. It did not do so in the matter of the writ of *habeas corpus ad prosequendum*. The existence of the exception as to the former, therefore, argues against—rather than for—the existence of an exception as to the latter.

2. Respondent argues (Reply, 8) that petitioner has no standing to raise the issue that the District Court has no extraterritorial jurisdiction to issue a writ of *habeas corpus ad prosequendum*.

Initially, we submit, the matter should not be considered by this Court. The point was not passed upon by the court below, the case having been submitted on the merits (III, 5).[1] Accordingly, respondent not having

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[1]It is true that respondent raised the point before the lower court in its motion to dismiss the appeal (Supp., Motion 1, 3, 7). However, upon oral argument it was stipulated that the appeal itself be submitted to the court on the merits (III, 5), this was done and the court ruled on the merits (*ibid.*).

filed a cross-petition for writ of certiorari, the question should not be passed upon herein (*United States v. Storer Broadcasting Co.*, 351 U.S. 192, 200). The general rule is that a point not pressed or passed upon by the court below will not be reviewed here (*Duignan v. United States*, 274 U.S. 195, 200; *Blair v. Oesterlein Machine Co.*, 275 U.S. 220, 225). We submit that that rule and not an exception should be applied here.

In any event, petitioner does have standing to raise the issue. The cases relied upon by the Government (Reply, 8) are inapposite. In none of them was the fundamental question of the *jurisdiction* of the court to act extraterritorially involved. Petitioner is not here claiming immunity from a second prosecution (*Ponzi v. Fessenden*, 258 U.S. 254), nor is he claiming the right to priority of judgment as between one sovereign and another (*U. S. ex rel. Moses v. Kipp*, 232 F. 2d 272 [CA 8 1956]), nor is he claiming that the federal court cannot try him unless and until the state proceedings are ended (*Barrett v. United States*, 270 F. 2d 772 [CA 8 1959]).

Petitioner is claiming that the order which affects him so substantially and directly was made without jurisdiction of the court. Since parties cannot waive lack of jurisdiction (*Ahrens v. Clark*, 335 U.S. 188, 193), it would seem clear that a person so vitally affected by the order has standing to call to the attention of the court the lack of jurisdiction.

Since "it is the duty of every court of its own motion to inquire into the matter (of jurisdiction) irrespective of the wishes of the parties, and be careful that it exercises no powers save those conferred by law," (*Minne-*

sota v. Hitchcock, 185 U.S. 373, 382) respondent cannot avoid inquiry into the issue on a theory that petitioner has no right to raise it.

In *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123 this Court held that organizations listed by the Attorney General in connection with the Government's *internal* personnel problem and where no action was being taken against the organizations nor anything required of them, had standing to test the validity of the Attorney General's action. Answering the standing to sue argument Mr. Jutice Frankfurter, in his concurring opinion, pointedly said (341 U.S. at 157):

> ". . . The objection to judicial restraint of an unauthorized exercise of powers is not weighty."

Finally, we submit, the problem involved in this case, including the question of the right to raise the issue, is important and substantial. It affects a not inconsequential facet of the administration of justice in the federal courts. The case is one appropriate for review by this Court.

Conclusion.

The petition for writ of certiorari should be granted.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1960
No. 72

PAUL JOHN CARBO,

Petitioner,

vs.

UNITED STATES OF AMERICA.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

PETITIONER'S OPENING BRIEF.

Opinions Below.

The District Court delivered no written opinion.

The opinion of the court below [R. 24] is reported at 277 F. 2d 433.

Grounds on Which the Jurisdiction of This Court Is Invoked.

1. The judgment of the court below, affirming the judgment of the District Court [R. 16] denying petitioner's motion to quash the writ of habeas corpus *ad prosequendum*, was dated and entered on March 23, 1960 [R. 30];

2. Petition for writ of certiorari was filed in this Court on April 20, 1960; [R. cover]. Certiorari was granted on May 31, 1960 [R. 44];

3. Statutory provisions believed to confer on this Court jurisdiction to review the judgment in question are 28 U. S. C. 1254(1) and 2101(c), Rule 22(2) and (3) of this Court and Rule 37(b), Federal Rules of Criminal Procedure.

Statutes Involved.

28 U. S. C., 2241 (62 Stat. 964, amended 63 Stat. 105) provides:

"(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

"(b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.

"(c) The writ of habeas corpus shall not extend to a prisoner unless:

"(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or

"(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

"(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or

"(4) He, being a citizen of a foreign state and domiciled therein, is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or

"(5) It is necessary to bring him into court to testify or for trial."

28 U. S. C. 1651 (62 Stat. 944, amended 63 Stat. 102) provides:

"(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

"(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction."

Question Presented for Review.

Does a United States District Court have jurisdiction under 28 U. S. C. 2241 or 28 U. S. C. 1651 to issue a writ of *habeas corpus ad prosequendum* requiring the production of a prisoner, then confined beyond the court's territorial jurisdiction, for trial before the issuing District Court?

Statement of the Case.

Petitioner is a defendant in a criminal proceeding pending in the United States District Court for the Southern District of California [R. 1]. He had been arraigned on December 2, 1959 [R. 10] and had pleaded not guilty on December 8, 1959 [R. 11].

On March 16, 1960, application was made to the District Court by the United States Attorney for a writ of *habeas corpus ad prosequendum* for the production of the body of petitioner in Los Angeles on March 29, 1960 for trial [R. 15]. That same day the court ordered the issuance of the writ [R. 16], and the writ was issued [R. 19].

On the same day petitioner filed a motion to quash the writ on the ground that the court had no jurisdiction to issue it [R. 12].[1] The motion was denied [R. 16] and notice of appeal to the court below was immediately filed [R. 17].

Respondent noticed a motion to dismiss the appeal with the court below for March 22, 1960 [R. 31].

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[1]Petitioner's motion to quash was actually filed two days before, on March 14, 1960 [R. 12]. The explanation for this is that a previous application and order for a writ had been made on March 11, 1960 by the United States Attorney but was defective in form. By stipulation in open court on March 16 (the return date of petitioner's motion to quash the previous writ) it was agreed that the moving papers and the Government's return [R. 14] would be deemed to be addressed to the March 16 papers.

On March 23, 1960, the court below affirmed, on the merits [R. 23, 30], the order of the District Court denying the motion to quash the writ [R. 24-29].

During all this time petitioner was ill and detained in the prison ward of the New York City Bellevue Hospital [R. 13].[1a] Because of that illness petitioner underwent a serious kidney operation on March 25, 1960. On March 28, 1960, the District Court continued the trial of the cause to July 12, 1960, and ordered the issuance of an amended writ, staying the enforcement thereof to June 24, 1960.[2] One of the reasons for the court's so doing was to afford this Court an opportunity to determine the issue herein and to avoid the mooting of this petition.

On June 15, 1960, subsequent to this Court's grant of certiorari, the District Court continued the trial date to February 14, 1961, and ordered a Third Amended writ to issue.[3]

[1a]Petitioner has since been transferred from Bellevue Hospital to the prison on Riker's Island, New York.

[2]A copy of that Order is attached hereto as Appendix "A" and of the Amended Writ issued pursuant thereto, as Appendix "B". Subsequent thereto, on April 12, 1960, the District Court ordered a Second Amended Writ to issue enlarging the persons to whom it is addressed. It is set out hereinafter as Appendix "C".

[3]That Order and the Writ, both dated June 20, 1960, are set out hereinafter as Appendices "D" and "E", respectively.

ARGUMENT.

I.

Under Presently Existing Law, a United States District Court Has No Jurisdiction to Issue an Extraterritorial Writ of Habeas Corpus Ad Prosequendum.

It seems perfectly plain from this Court's decision in *Ahrens v. Clark*, 335 U. S. 188, as well as from its decision in *United States v. Hayman*, 342 U. S. 205, that the power given the District Courts by 28 U. S. C., 2241 is limited territorially whether the particular writ involved is *habeas corpus ad subjiciendum*, as in *Ahrens*, or *testificandum* or *prosequendum*, as here. Accordingly, for the court to have power to issue an extraterritorial writ, that power must somehow be spelled out of 28 U. S. C. 1651, an exercise in orthography we say cannot be done. This, because of the general rule that absent "specific exceptions created by Congress the jurisdiction of the district courts is territorial" (*Ahrens v. Clark*, 335 U. S. at 190), and because the cases, as well as the language of the section, seem clear to the effect that 1651[4] does not, nor did Congress intend to, enlarge the territorial jurisdiction of the courts.

Ahrens holds squarely that a District Court under 28 U. S. C. 2241 has no jurisdiction to issue an extraterritorial writ of *habeas corpus*. The court below holds [R. 26] that *Ahrens* is not in point in this case be-

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[4]Its predecessor, as well as that of 2241, have been on the statute books from the beginning (1 Stat. 81; Sec. 14 of the Act of Sept. 24, 1789). As Appendix "F" hereto, we have set out a chart showing the derivation of the present 28 U. S. C. 1651 and 2241.

cause the writ in that case was *ad subjiciendum* while the writ involved here is *ad prosequendum* and that there is a difference in the function of the two.

But, we respectfully suggest, there is nothing in either *Ahrens* or section 2241 which even remotely permits of a holding that there is any *territorial* difference between the two.[5] The phrase "within their respective jurisdictions" appearing in Subdivision (a) of 2241 applies to the *whole* statute, including subdivision (c)(5),[6] as well as subdivision (c)(3).[7] The holding of the court below to the contrary flies full force in the face of this Court's decision in *Ahrens* as well as of 2241 itself. Moreover, "the statutory scheme" before the court and considered by it, in *Ahrens* (335 U. S. at 190), is precisely that which is before the Court here and overlooked by the court below. All the 1948 revision, which resulted in 28 U. S. C. 2241, did was to combine the previous 28 U. S. C. (1940 Ed.) 451, 452 and 453 and put in one statute what had formerly been in three. Thus, the "within their respective jurisdictions" limitation which was present in Section 452, must also be considered to have applied to Section 453 which is essentially that portion of today's Section 2241 which is found in subsection (c) thereof. The meaning attributed by the court below [R. 26, n. 1] to the elimina-

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[5] *Cf. In re Van Collins* (D. Me. 1958), 160 Fed. Supp. 165, 166, note 1: "The writ of habeas corpus ad prosequendum is merely one variant of the common law writ of habeas corpus, the phrase 'ad prosequendum' being simply the designation of the purpose for which the writ is sought." (Citing cases by this Court.)

[6] "To bring into court to testify or for trial."

[7] "In custody in violation of the Constitution or laws or treaties of the United States."

tion by Section 2241 of the words "for the purpose of inquiring into the cause of restraint of liberty" formerly in Section 452 does not follow. Subsection 5 of subsection (c) of Section 2241 reads that "the writ of habeas corpus (without the words above quoted) shall not extend to a prisoner unless (I)t is necessary to bring him into court to testify or for trial." Therefore it is not correct to say, as does the court below, that the words "habeas corpus", as used in Section 2241 (and as used in former Section 453) means only a proceeding inquiring into the cause of restraint of liberty. To so read the words is to read subdivision (5) of subsection (c) right out of the statute.

The quotation by the court below [R. 27] from *Ponzi v. Fessenden*, 258 U. S. 254, 264, is inapposite. Petitioner does not claim that he is immune from a second prosecution. His point is the very basic one that a federal (or, indeed, any) court must obey the law in issuing its orders and that an order issued by a court which is, as we say, beyond and in excess of its jurisdiction cannot be permitted to stand.

The court below next holds [R. 29] that there is extraterritorial jurisdiction to issue the writ under 28 U. S. C. 1651 (the "all writs" statute). This, the court says is so by virtue of this Court's decision in the *Hayman* case. The court's reasoning is [R. 28] that the trial court has jurisdiction over the offense and over petitioner and therefore the writ is in aid of that jurisdiction. But this reasoning proves too much and the *Hayman* case holds no such thing. If accepted, it would mean that the territorial jurisdiction of the District Courts would be completely obliterated and those courts would, in effect, be but one nationwide court

merely because the court has jurisdiction of the case. Before so revolutionary a concept can be attributed to Congress or accepted, certainly Congress would have said so.

Rather than being "illustrative" of the fact that the District Courts have extraterritorial jurisdiction to issue writs of *habeas corpus ad prosequendum,* as stated by the court below [R. 28], the two rules of criminal procedure cited (*ibid.*) by it [4(c)(2)—warrants; and 17(e)(1)—subpoenas] are precisely illustrative of the contrary. They show that unless Congress (in these instances, through the rule making authority of this Court) wants to give the District Courts extraterritorial jurisdiction, those courts simply do not have it. The revisor's notes to Rule 4(c)(2) say:

> "This rule and Rule 9(c)(1) modify the existing practice under which a warrant may be served only within the district in which it is issued. Mitchell v. Dexter, C. C. A. 1, 1917, 244 F. 926; Palmer v. Thompson, 1902, 20 App. D. C. 273; . . ."

Thus, the rules enlarged the territorial jurisdiction of the district courts as to warrants and subpoenas only. There are "specific exceptions" as to them. The rule changes did not, however, nor do they purport to, enlarge the territorial jurisdiction of the court with respect to writs of *habeas corpus ad prosequendum.*

That no extraterritorial jurisdiction is breathed into 28 U. S. C. 1651(a) by virtue of the fact, relied upon by the court below [R. 28], that the district court has jurisdiction over the offense and over the defendant is illustrated and emphasized by the fact that subsequent to the decisions in the *Mitchell v. Dexter* and *Palmer*

v. Thompson cases referred to in the revisor's note to Rule 4(c)(2), and because of those cases, the rules were changed to enlarge the territorial jurisdiction of the District Courts *as to certain situations*; that without "such specific exceptions" the general rule of territorial limitation applies. Thus, in *Palmer v. Thompson* (1902), 20 App. D. C. 273, the issuing District Court had jurisdiction over the offense and over the defendant. There the defendant had already been tried and found guilty in the Eastern District of Tennessee and was wanted back from the District of Columbia for sentencing. At that time (1902) the "all writs statute" was then too in the law (Rev. Stats. Sec. 716)[8] and read essentially the same way as it does today.[9]

So also did the Eastern District of Wisconsin have "jurisdiction" over the cause and the defendant in *Mitchell v. Dexter,* 244 Fed. 926 (C. C. A. 1, 1917). But this, nor the then "all writs statute" (see f. n. 8 and 9 *supra*), did not enlarge the territorial jurisdiction of the Wisconsin court to issue its writ of arrest for effectuation in Massachusetts. The court said (244 Fed. at 930):

> "The Court of Appeals for the District of Columbia, in Palmer v. Thompson, 20 App. D. C. 273, expressly held that, in the absence of an act of Congress conferring the power, the federal court in

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[8]And had been since 1789 (1 Stat. 81; Act of Sept. 24, 1789, Ch. 20, Sec. 14). See Appendix "F" attached hereto.

[9]"The Supreme Court and the circuit and district courts . . . shall have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law." The addition of the words in 1651(a) "or appropriate" and the change of the words "for the exercise" to "in aid" did not, we submit, effect any change of meaning.

one district had no authority in a criminal case to issue its writ to the marshal of another federal district, commanding him to arrest a person within his jurisdiction, but outside that of the court issuing the writ, and that such power was not conferred by section 716 of the Revised Statutes. . . .

"Furthermore, we do not think section 262 of the Code (R. S. Sec. 716; Judiciary Act Sept. 24, 1789, c. 20, Sec. 14, 1 Stat. 73) gives authority to a federal District Court to issue processes to run beyond the limits of the territory in which it is established, but rather that it is a designation of the form or character of writs which such court may issue within the territory where it is established. Hills & Co. v. Hoover, 220 U. S. 329, 336, 337, 31 Sup. Ct. 402, 55 L. Ed. 485, Ann. Cas. 1912C, 562; McClellan v. Carland, 217 U. S. 269, 279, 30 Sup. Ct. 501, 54 L. Ed. 762."

Accordingly the fact that the district court has jurisdiction over the cause and the defendant, does not enlarge its territorial jurisdiction. Where extraterritoriality is desired, Congress and this Court (but only through its rule making power) says so.

And, of course, the fact that as to some matters (subpoenas and warrants) the district courts have been given extraterritorial jurisdiction does not mean that in other respects (here, writs of *habeas corpus ad prosequendum*) the jurisdiction is likewise enlarged. To so hold would set at naught the need for "specific exceptions" to the territorial rule (*Ahrens v. Clark*, 335 U. S. at 190).

The court below misreads, we respectively suggest, this Court's opinion in *United States v. Hayman*, 342

U. S. 5. In *Hayman* this Court was careful to make very clear that it was not modifying or making inroads on *Ahrens*, or enlarging the territorial sweep of the writ of habeas corpus. Thus the Court said (342 U. S. at 220):

> ". . . *This is not a habeas corpus proceeding.* The sentencing court in the Southern District of California would not be issuing an original writ of habeas corpus to secure respondent's presence in another district. Issuance of an order to produce the prisoner is auxiliary to the *jurisdiction* of the trial court over respondent *granted in Section* 2255 itself and invoked by respondent's filing of a motion under that Section." (Italics added.)

As we understand *Hayman*, it is this:

Prior to the enactment of 28 U. S. C. 2255, when a prisoner desired to test the validity of the sentence which had been imposed upon him, he filed habeas corpus proceedings in the district in which he was confined. Because of the territorial limitation of habeas corpus, the prisoner could not file such proceedings in the district in which he had been sentenced. The result was that there arose the practical difficulty of holding the hearing in the district of the prisoner's confinement, thus requiring the bringing of witnesses, records, etc. from the district in which defendant had been sentenced. To meet these difficulties section 2255 was enacted, and by its provisions:

1. The defendant was given the right to file his motion in the district court in which he had been sentenced;

2. The district court in that district was given the jurisdiction to hold the hearing in that district: and,

3. That district court was given the authority —by the statute itself—to produce the prisoner at the hearing, even though he be confined in another district.

In other words, Congress had made a *specific exception* to the rule that the power of the district courts to issue writs is limited to the territorial jurisdiction of said courts. This exception was found by this Court in Section 2255 itself.

But the statutes (18 U. S. C. 1951, 875(b) and 371), for alleged violation of which defendant is charged, either expressly or by implication, extend the territorial jurisdiction of the trial court. Hence 28 U. S. C. 1651(a) cannot enlarge that jurisdiction. And the statute (28 U. S. C. 2241) which gives the Court jurisdiction to issue the writ altogether is, as *Ahrens* makes clear, limited territorially.

The concern of the Court below [R. 29] that a decision upholding petitioner's contention would mean that the District Courts would be impotent to bring a prisoner to trial from another district, is unnecessary. Petitioner claims only that the court cannot exceed its jurisdiction and that if Congress wants to make habeas corpus jurisdiction extraterritorial, it knows how to, and can, do so. As has been said: "The objection to judicial restraint of an unauthorized exercise of power is not

weighty." (*Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U. S. 123, 157, concurring opinion).

It seems clear, therefore, that the decision of the court below is in direct conflict with this Court's decision in *Ahrens* and that the court below misunderstood the meaning of this Court's ruling in *Hayman*.

The better reasoned decisions of the lower federal courts are in accord with petitioner's argument.

In *Edgerly v. Kennelly*, 215 F. 2d 420 (C. A. 7, 1954) cert. den. 348 U. S. 938, the court held that the District Courts did not have jurisdiction to issue an extra-territorial writ of *habeas corpus ad testificandum*. In answer to the argument that because the court had jurisdiction over plaintiff's action under the Civil Rights Act (former 8 U. S. C. 43, 47, 48; now 42 U. S. C. 1983, 1985, 1986), it had jurisdiction to bring him before the court under 28 U. S. C. 1651, the court said (pp. 421-422):

> ". . . Plaintiff . . . concedes . . . that the jurisdiction of the court, if it exists, must be found in the 'all writs statute,' 28 U.S.C.A. §1651, which authorizes a court to 'issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.' It is pointed out that the court had jurisdiction of the action and it was in aid of its jurisdiction that the plaintiff be brought to Chicago to testify in his own behalf. This contention, if accepted, would mean that this provision enlarged the territorial jurisdiction of the court. We think that such

is not its purpose. While the section augments the power of a court in cases of existing jurisdiction, it in no wise expands or extends its territorial jurisdiction."[10]

While *Goldberg v. Hoffman*, 225 F. 2d 463 (C. A. 7, 1955), did not involve an *ad testificandum* or *ad prosequendum* matter, it is clear that the Seventh Circuit adheres to its *Edgerly* decision and considers it to be sound law. Thus it said (p. 467):

> "The historic limitation of the jurisdiction of the various federal courts to the Circuit or District in which they sit is too well established to require restatement. *Georgia v. Pennsylvania R. Co.*, 324 U. S. 439, 467, 65 S. Ct. 716, 89 L. Ed. 1051; *Edgerly v. Kennelly*, 7 Cir., 215 Fed. 2d 420; *Reconstruction, Finance Corp. v. Maley*, 7 Cir., 125 Fed. 2d 131, 137. We have recently rejected as untenable the theory that the All Writs Act, 28 U.S.C.A. §1651, may enlarge the territorial jurisdiction of the federal courts. *Edgerly v. Kennelly, supra*, 215 Fed. 2d at page 421-422. See also *Ahrens v. Clark*, 335 U. S. 188, 68 S. Ct. 1443, 92 L. Ed. 1898."

See also *United States v. Kniess*, 251 F. 2d 669 (1958).

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[10] *Cf. Shimola v. Local Board No.* 42, 40 Fed. Supp. 808, 809 (N. D. Ohio, 1941):

> "That section (28 USC 377, the predecessor to the now 28 USC 1651) however, merely makes available to the District Court 'all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions,' but it does not confer or expand jurisdiction."

In *Yodock v. United States*, 196 F. 2d 1018 (C. A. 3, 1952), the defendant had been brought to trial from another jurisdiction by means of a writ of *habeas corpus ad prosequendum*. *After* sentence he moved to vacate on the ground that the trial court had not acquired jurisdiction over him. The court affirmed the trial court's order denying the motion to vacate on the ground that (p. 1018): "The manner in which his presence was secured did not affect the power of the court to try him."[11] But as to the validity of the extraterritorial writ of *habeas corpus ad prosequendum*, the court said (*ibid*):

> "It may be conceded that the writ was improperly issued outside the Middle District of Pennsylvania."

A noteworthy district court decision of the Third Circuit, and one which has not been overruled or criticized, but on the contrary has been cited with approval and followed[12] is *Phillips v. Hiatt*, 83 Fed. Supp. 935 (D. Del. 1949).[13] In that case a defendant in a criminal action pending before the Delaware Federal Court was incarcerated in the Federal Penitentiary at Atlanta, Georgia. Claiming the right to a speedy trial

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[11] *Cf.* this Court in *Frisbie v. Collins*, 342 U. S. 519.

[12] *Edgerly v. Kennelly*, 215 F. 2d 420, 422 (C. A. 7, 1954), cert. den. 348 U. S. 938; *In re Van Collins*, 160 Fed. Supp. 165, 167 (D. Me. 1958); and see *United States v. Coles*, 88 Fed. Supp. 150, 151, n. (D. Ore. 1949).

[13] In the oral argument before this Court in *Nelson v. County of Los Angeles*, No. 152, Oct. Term, 1959, 362 U. S. [illegible] ne of the Justices chided counsel for petitioners for not citing or relying upon pertinent District Court cases. Counsel do not intend to make the same mistake here.

under the 6th Amendment, the defendant moved the court for a writ (though not so denominated) of *habeas corpus ad prosequendum*. The court thus posed the question (pp. 936-937):

> "The question in this case is whether a United States District Court has the power or jurisdiction to issue a writ of habeas corpus or other writ in the nature thereof on behalf of a person confined in a federal penitentiary outside the territorial limits of such court under a sentence imposed by another United States District Court, when the purpose of the writ is to have the prisoner brought within the territorial jurisdiction of the issuing court to stand trial on a new and different charge."

In answering the question in the negative, the court exhaustively discussed the matter. For example (p. 938):

> ". . . (A)ssuming that petitioner's counsel are correct in that the relief sought by petitioner may properly be granted under Section 1651, still such relief may not be granted by this court for the very same reason that relief may not be granted under Section 2241, viz., that the order of this court may not run beyond its territorial jurisdiction.
>
> "Under general provisions of law, a United States District Court cannot issue process beyond its territorial limits. *Georgia v. Pennsylvania R. Co.*, 1945, 324 U.S. 439, 467-468; 65 S. Ct. 716, 89 L. Ed. 1051. A specific exception by Congress is a prerequisite to the extension of the district court's jurisdiction beyond their respective territorial limits. . . ."

And it concluded its opinion (p. 940):

> "Irrespective of the desire of this court to secure to petitioner what may be deemed to be substantial constitutional rights, the lack of jurisdiction in the court compels a dismissal of the petition."

Another untampered with District Court decision[14] is *In the Matter of Karol Van Collins*, 160 Fed. Supp. 165 (D. Me. 1958). The situation there was essentially the same as in *Phillips v. Hiatt, supra*, the defendant seeking to be brought before the court for trial by means of a writ of *habeas corpus ad prosequendum*. In denying the writ, the court said (pp. 166-167):

> ". . . There is nothing in §1651 specifically giving to district courts the power to issue writs thereunder beyond their respective territorial limits. It follows, therefore, that this Court is without jurisdiction under §1651 to grant the relief sought for the same reason that it may not grant relief under §2241, viz., that the order of this Court may not run beyond its territorial jurisdiction. . . ."

Conclusion.

The judgment of the court below should be reversed and the writ of *habeas corpus ad prosequendum* ordered quashed.

Respectfully submitted,

A. L. WIRIN,
FRED OKRAND,
Attorneys for Petitioner,

WILLIAM B. BEIRNE,
Of Counsel.

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[14]See footnote 13, *supra*.

APPENDIX "A".

In the United States District Court, Southern District of California, Central Division.

United States of America, Plaintiff, v. Paul John Carbo, *et al.*, Defendants. No. 27973-CD.

Order.

The above cause having come on for hearing on March 28, 1960, the United States appearing by Robert John Jensen, Chief, Criminal Division, Assistant United States Attorney and Charles A. Lynberg, Assistant United States Attorney and the defendant Paul John Carbo appearing by his attorneys William B. Beirne and A. L. Wirin, it appearing that because of the illness of the said defendant Paul John Carbo and the performance upon him of a kidney operation on March 25, 1960, that it is improvident to transport said defendant from the New York City Prison, Bellevue Hospital, New York City to Los Angeles, California for trial on or before March 29, 1960, the date presently set for the trial of the above cause, and the Court having continued said trial date of said cause until July 12, 1960, and good cause appearing therefor:

1. It is ordered and adjudged that the Order of the Court dated March 16, 1960 ordering that a Writ of Habeas Corpus *ad Prosequendum* issue as prayed for in the application dated March 16, 1960, of the United States Attorney, is continued in full force and effect.

2. The order and Judgment of the Court dated March 16, 1960, denying said defendant's Motion to Quash said Writ of Habeas Corpus *ad Prosequendum* remains in full force and effect.

3. The execution of said Order of March 16, 1960 ordering that a Writ of Habeas Corpus *ad Prosequendum* issued as heretofore prayed for herein is continued, and the enforcement and execution of the Writ of Habeas Corpus *ad Prosequendum* issued by the Clerk of this Court on March 16, 1960 pursuant to the aforesaid Order, is continued and stayed in the following respects: said writ shall be executed on or after June 24, 1960; said defendant shall be transported from the New York City Prison, Bellevue Hospital, New York City to Los Angeles, California for trial, pursuant to said Writ, between June 24 and June 27, 1960, the defendant to be brought to Los Angeles by June 27, 1960 during said period between June 24 and June 27, 1960.

The Clerk shall issue an Amended Writ of Habeas Corpus *ad Prosequendum* pursuant to the foregoing Order.

Dated: This 28th day of March, 1960.

ERNEST A. TOLIN,
ERNEST A. TOLIN,
United States District Judge.

Approved as to form:
ROBERT JOHN JENSEN,
Of Counsel for the United States.

APPENDIX "B".

United States District Court, Southern District of California, Central Division.

United States of America, Plaintiff, v. Paul John Carbo, aka Frankie Carbo, *et al.*, Defendant. No. 27973, Criminal.

Amended Writ of Habeas Corpus ad Prosequendum, Being an Amendment to the Writ of Habeas Corpus ad Prosequendum Issued.

Filed March 16, 1960.

The President of the United States of America.

To: The Warden, Sheriff or Jailor of New York City Prison, Bellevue Hospital, New York, New York.

Greeting:

We command that you produce and deliver the body of Paul John Carbo, aka Frankie Carbo now in your custody before the Honorable Ernest A. Tolin, Judge of the United States District Court, Second Floor, United States Post Office and Courthouse, 312 North Spring Street, Los Angeles, on July 12, 1960, at the hour of 10:00 a.m., in order that said defendant in the above-entitled case may then and there be tried at said time and place, and also at such other times as may be ordered by the said court, and have you then and there this writ.

The delivery of the body of said Paul John Carbo, aka Frankie Carbo to the Courtroom of said United States District Court, as aforesaid, and the return by you of said defendant to your custody shall be deemed sufficient compliance with the writ.

The enforcement and execution of the foregoing writ of Habeas Corpus *ad Prosequendum* is continued and stayed in the following respects: this Writ shall be executed on or after June 24, 1960; said defendant shall be transported from the New York City Prison, Bellevue Hospital, New York City to Los Angeles, California for trial, pursuant to said Writ, between June 24 and June 27, 1960, the defendant to be brought to Los Angeles by June 27, 1960 during said period between June 24 and June 27, 1960.

Witness the Honorable Ernest A. Tolin, Judge of the United States District Court for the Southern District of California.

Dated: March 30, 1960.

Clerk, United States District Court,
Southern District of California,
By EDW. F. DREW,
Deputy Clerk.

APPENDIX "C".

United States District Court, Southern District of California, Central Division.

United States of America, Plaintiff, v. Paul John Carbo, aka Frankie Carbo, *et al.*, Defendants. No. 27973-CD.

Second Amended Writ of Habeas Corpus Ad Prosequendum, Being an Amendment to the Writ of Habeas Corpus Ad Prosequendum Issued March 16, 1960.

The President of the United States of America.

To: The United States Marshal, Southern District of New York; The United States Marshal, Southern District of California; or any United States Marshal; The Warden, Sheriff or Jailor, Prison Ward, Bellevue Hospital, New York, New York; The Warden, or Jailor, New York City Penitentiary, Rikers Island, Bronx, New York; or such other officer of the State of New York having custody of the person of Paul John Carbo, aka Frankie Carbo.

GREETING

We Command that you produce and deliver the body of Paul John Carbo, aka Frankie Carbo, now in your custody before the Honorable Ernest A. Tolin, Judge of the United States District Court, Second Floor, United States Post Office and Courthouse, 312 North Spring Street, Los Angeles, California, on July 12, 1960, at the hour of 10:00 a.m., in order that said defendant in the above-entitled case may then and there be tried at said time and place, and also at such other times as may be ordered by said Court, and have you then and there this Writ.

The delivery of the body of said Paul John Carbo, aka Frankie Carbo, to the Courtroom of said United States District Court, as aforesaid, and the return by you of said defendant to your custody shall be deemed sufficient compliance with the Writ.

The enforcement and execution of the foregoing Writ of Habeas Corpus ad Prosequendum is continued and stayed in the following respects: This Writ shall be executed on or after June 24, 1960; said defendant shall be transported from the New York City Prison, Bellevue Hospital, New York City, or from such other place within the State of New York that he may be held, to Los Angeles, California, for trial, pursuant to said Writ, between June 24 and June 27, 1960, the defendant to be brought to Los Angeles by June 27, 1960 during said period between June 24 and June 27, 1960.

Witness the Honorable Ernest A. Tolin, Judge of the United States District Court for the Southern District of California.

Dated: April 12, 1960.

Clerk, United States District Court,
Southern District of California,

By .....

Deputy Clerk.

APPENDIX "D".

United States District Court for the Southern District of California, Central Division.

United States of America, Plaintiff, v. Paul John Carbo, aka Frankie Carbo, *et al.*, Defendants. No. 27973-CD.

Order for Issuance of an Amended Writ of Habeas Corpus Ad Prosequendum.

Upon the application of the United States joined in by the counsel of record for defendant Paul John Carbo, the trial date of the within captioned case having been continued until February 14, 1961, and good cause appearing therefor, it is hereby

Ordered that an amended writ of habeas corpus ad prosequendum, being a further amendment to the writ of habeas corpus ad prosequendum issued March 16, 1960, shall be issued by the Clerk of this Court, which writ shall be in the same form as the last amended writ except as to the dates which shall be as follows:

A) Said new amended writ shall recite the trial date of this cause as being set for February 14, 1961, at the hour of 10:00 A.M.; and

B) Said writ shall provide that the execution of said writ shall commence on but not before January 28, 1961, and be completed on but not after February 1, 1961.

Dated: June 20, 1960.

ERNEST A. TOLIN,
United States District Judge.

APPENDIX "E".

United States District Court, for the Southern District of California, Central Division.

United States of America, Plaintiff, v. Paul John Carbo, aka Frankie Carbo, *et al.*, Defendants. No. 27973-CD.

Third Amended Writ of Habeas Corpus Ad Prosequendum, Being an Amendment to the Writ of Habeas Corpus Ad Prosequendum Issued March 16, 1960.

The President of the United States of America.

To: The United States Marshal, Southern District of New York; The United States Marshal, Southern District of California; or any United States Marshal; The Warden, Sheriff or Jailor, Prison Ward, Bellevue Hospital, New York, New York; The Warden, or Jailor, New York City Penitentiary, Rikers Island, Bronx, New York; or such other officer of the State of New York having custody of the person of Paul John Carbo, aka Frankie Carbo.

GREETING

We command that you produce and deliver the body of Paul John Carbo, aka Frankie Carbo, now in your custody before the Honorable Ernest A. Tolin, Judge of the United States District Court, Second Floor, United States Post Office and Courthouse, 312 North Spring Street, Los Angeles, California, on February 14, 1961, at the hour of 10:00 A.M., in order that said defendant in the above-entitled case may then and there be tried at said time and place, and also at such other times as may be ordered by said Court, and have you then and there this Writ.

The delivery of the body of said Paul John Carbo, aka Frankie Carbo, to the Courtroom of said United States District Court, as aforesaid, and the return by you of said defendant to your custody shall be deemed sufficient compliance with the Writ.

The enforcement and execution of the foregoing Writ of Habeas Corpus ad Prosequendum is continued and stayed in the following respects: This Writ shall be executed on or after January 28, 1961; said defendant shall be transported from the New York City Prison, Bellevue Hospital, New York City, or from such other place within the State of New York that he may be held, to Los Angeles, California, for trial, pursuant to said Writ, between January 28 and February 1, 1961, the defendant to be brought to Los Angeles by February 1, 1961, during said period between January 28 and February 1, 1961.

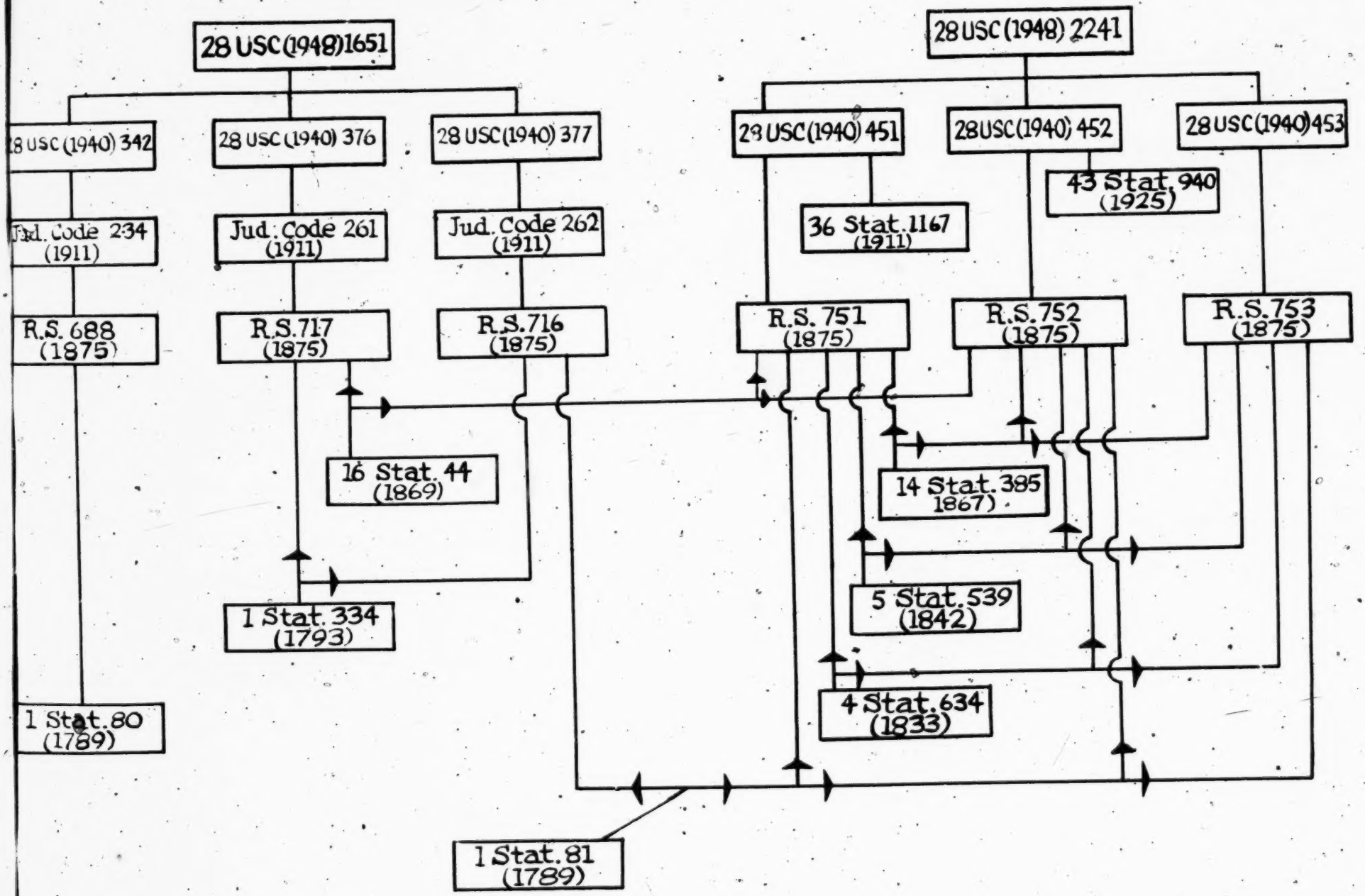
Witness the Honorable Ernest A. Tolin, Judge of the United States District Court for the Southern District of California.

Dated: June 20, 1960.

Clerk, United States District Court,
Southern District of California,

By JOSEFINA DEAN
Deputy Clerk.

Derivation of present 28 USC 1651 and 28 USC 2241



Appendix "F"

FILE COPY

Supreme Court, U.S.
FILED
SEP 19 1960
JAMES R. BROWNING, Clerk

No. 72

In the Supreme Court of the United States

OCTOBER TERM, 1960

PAUL JOHN CARBO, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

J. LEE RANKIN,
Solicitor General,

MALCOLM RICHARD WILKEY,
Assistant Attorney General,

BEATRICE ROSENBERG,
RICHARD W. SCHMUDE,
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Department of Justice,
Washington 25, D. C.

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In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 72

PAUL JOHN CARBO, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (R. 24-29) is reported at 277 F. 2d 433.

JURISDICTION

The judgment of the court of appeals was entered on March 23, 1960. The petition for a writ of certiorari was filed on April 20, 1960, and was granted on May 31, 1960 (R. 44). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the trial court properly refused to quash, at the instance of the petitioner, a writ of *habeas corpus ad prosequendum* issued by a district court, addressed to state custodial officials outside the district, ordering them to produce the petitioner, a state prisoner also outside the district, for trial in the federal district court.

STATUTES AND RULES INVOLVED

28 U.S.C. 1651 provides in pertinent part:

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

* * * *

28 U.S.C. 2241 provides in pertinent part:

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

* * * *

(c) The writ of habeas corpus shall not extend to prisoner unless:

(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or,

(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or,

(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or

(4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or

(5) It is necessary to bring him into court to testify or for trial.

Pertinent provisions of the Federal Rules of Criminal Procedure are as follows:

Rule 4 (c) (2):

The warrant may be executed or the summons may be served at any place within the jurisdiction of the United States.

Rule 9 (a):

Upon the request of the attorney for the government the court shall issue a warrant for each defendant named in the information, if it is supported by oath, or in the indictment. * * *

Rule 17 (e) (1):

A subpoena requiring the attendance of a witness at a hearing or trial may be served at any place within the United States.

Rule 40 (b):

(1) If a person is arrested upon a warrant issued in another state at a place 100 miles or more from the place of arrest, or without a warrant for an offense committed in another state at a place 100 miles or more from the place of arrest, he shall be taken without unnecessary delay before the nearest available commissioner or a nearby judge of the United States in the district in which the arrest was made.

* * * *

(3) * * * If the prosecution is by indictment, a warrant of removal shall issue upon production of a certified copy of the indictment and upon proof that the defendant is the person named in the indictment. * * * If a warrant of removal is issued, the defendant shall be admitted to bail for appearance in the district in which the prosecution is pending in accordance with Rule 46. After a defendant is held for removal or is discharged, the papers in the proceeding and any bail taken shall be transmitted to the clerk of the district court in which the prosecution is pending.

STATEMENT

A ten-count indictment returned on September 22, 1959, in the District Court for the Southern District of California charged the petitioner and four others with extortion and conspiracy, in violation of 18 U.S.C. 875 and 1951 (R. 1-9). The petitioner was arrested in Baltimore, Maryland, where he posted bond returnable to the District Court for the Southern District of California sitting in Los Angeles. Prior

to appearing in Los Angeles, the petitioner pleaded guilty to three misdemeanor charges in New York City, and was sentenced to serve a two-year term of imprisonment and to pay a fine. The authorities at the New York City Prison honored a writ of *habeas corpus ad prosequendum* from the California district court, and the petitioner appeared before the district court there on December 2 and 8, 1959, where he pleaded not guilty to the indictment (R. 10, 11). The trial date was set for March 29, 1960, and the district court granted the petitioner's request to return to New York in order to obtain counsel (R. 11).

On March 16, 1960, the district court issued a writ of *habeas corpus ad prosequendum* to the Warden of the New York City Prison, directing that the petitioner be returned to Los Angeles for trial on March 29, 1960 (R. 19). The petitioner's motion to quash the writ was denied on the same day (R. 16-17, 20-21). On appeal, the court of appeals unanimously affirmed this order (R. 30). In view of the fact that the petitioner underwent a medical operation, the district court subsequently amended the return date of the writ to June 27, 1960, with the petitioner to be transported from New York to California after June 24 (Pet. App. "C" and "D"). The petitioner was scheduled to be tried with his co-defendants in the district court on July 12, 1960, but, in view of the grant of certiorari in this case, the trial has been postponed to February, 1961. The return date of the writ has been extended to January 28, 1961.

SUMMARY OF ARGUMENT

The sole question in this case is the jurisdiction of a district court to issue a writ of *habeas corpus ad prosequendum*, addressed to prison officials of a state outside the territorial limits of the federal judicial district of issuance, directing them to deliver for trial a prisoner held by them.

The function of such a writ is best considered against the normal procedure in a federal trial. Ordinarily, a person not in custody at the time he is indicted is served with a warrant of arrest which, under the present rules, may be served anywhere in the jurisdiction of the United States. If the place of arrest is more than 100 miles distant, the accused is entitled to a removal hearing, at which the sole contested issue, where there has been an indictment, is identity. The chief purpose of the removal procedure, where identity is not contested, is to inform the accused of his right to counsel and to fix bail for the appearance of the accused before the district of trial. The petitioner was accorded these rights in a removal hearing which occurred before he was in state custody.

Thereafter, in the normal case, the accused is under a duty to appear without further process of any kind. His failure to appear is a default of his bond, which is not necessarily excused because in the meantime he has been taken into state custody. *Taylor* v. *Taintor*, 16 Wall. 366. The writ of *habeas corpus ad prosequendum* serves the function of enabling the defendant to carry out his legal and contractual obli-

gation to appear for trial, without being adjudged in default of appearance. It is not really a substitute for process addressed to the defendant since the court has the right to assume that a defendant will do that which he is obligated to do, *i.e.*, appear for trial. It is merely the way in which the federal court obtains the consent of the state to the removal of the obstacle of state custody which would otherwise prevent a trial under the indictment.

The petitioner's argument that the writ may not be utilized when the petitioner is outside the district where it is issued is based on a supposed parallel to the issuance of a writ to inquire into the legality of detention; such a writ is restricted to the place of imprisonment under 28 U.S.C. 2241, as interpreted by this Court in *Ahrens* v. *Clark*, 335 U.S. 188. The difference between the use of the writ in that case and in this is that there the court has no basis for jurisdiction except the fact of the detention; the proceeding is in effect an independent civil action. Here, on the other hand, jurisdiction over the subject matter has already been established by the institution of the criminal proceeding with respect to an offense which occurred in the district. The writ is necessary to give effect to the pre-existing jurisdiction of the district court over that crime. Therefore, the writ is clearly "within the jurisdiction" of the district court issuing it, even though the petitioner was in New York.

This is the same type of jurisdiction outside the district exercised in serving arrest warrants and subpoenas, or as that exercised with respect to cor-

porate defendants in criminal cases even before adoption of the Rules of Criminal Procedure, or as that followed under the collateral review provisions of 28 U.S.C. 2255. Where the authority for such extra-territorial jurisdiction is not made clear by rule or statute, the courts have found it by construction (as in the interpretation of 28 U.S.C. 2255 in *United States* v. *Hayman*, 342 U.S. 205) or by reference to the all writs provision of 28 U.S.C. 1651 (*Adams* v. *McCann*, 317 U.S. 269; *Price* v. *Johnston*, 334 U.S. 266).

Moreover, the petitioner is not in a position to press an argument on the jurisdiction of the district court to issue the writ. He submitted to the jurisdiction of the court when he appeared, pleaded not guilty, and was permitted to return to New York to obtain counsel. At the present stage of the case, the writ is addressed to the New York authorities and it is a question between them and the federal court whether he should be returned to California for trial. The prisoner has no ground to complain if he is surrendered by one sovereign for trial by another. *Ponzi* v. *Fessenden*, 258 U.S. 254.

ARGUMENT

I

Introduction: The Function of the Writ of *Habeas Corpus Ad Prosequendum* and the Issues In This Case

The sole question raised by the petition for a writ of certiorari is the power of the District Court for the Southern District of California to bring before it

for trial a prisoner, held by New York custodial officials, by means of a writ of *habeas corpus ad prosequendum* which the prison officials, to whom it is addressed, have not contested. The petitioner does not challenge the power of the district court to try him on the indictment even though he is in state custody; nevertheless he, in effect, seeks to defeat that power by contesting the process by which the district court sought to, and did, obtain the consent of the state to enable him to carry out his legal obligation to appear for trial.[1]

The issue raised can best be understood when considered against the usual procedure for bringing a defendant to trial. In the usual case, where an indictment has been returned against a defendant not yet arrested, as in this case, a warrant of arrest issues as of right. Rule 9 (a), F. R. Crim. P. (*supra*, p. 3); see *Ex Parte United States*, 287 U.S. 241. The warrant may be executed at any place within the jurisdiction of the United States. Rule 4 (c) (2) (*supra*, p. 3). However, if a defendant is arrested more than 100 miles from the place of indictment, he is entitled to a removal hearing in the district where arrested. Where the arrest is made under an indictment, "a warrant of removal shall

[1] When the petitioner first moved to quash the writ, his allegation was that he was too ill to be transferred, but he chose to present this issue as a question of power to issue the writ, rather than a mere request for continuance of the trial because of illness. No issue as to the petitioner's ability to go to trial is now involved. The petitioner's trial has been postponed (see *supra* p. 5) and the sole issue is the validity of the writ—not the propriety of its exercise.

issue upon production of a certified copy of the indictment and upon proof that the defendant is the person named in the indictment." Rule 40 (b) (3), F. R. Crim. P. (*supra*, p. 4). In other words, the sole issue which may be contested on the removal hearing, where an indictment has been returned, is the identity of the defendant. The main purpose of the removal hearing, if identify is not contested, is to inform the defendant of his right to counsel and to admit him to bail, "for appearance in the district in which the prosecution is pending." Rule 40 (b) (3) (*supra*, p. 4). Thereafter, "the papers in the proceeding and any bail taken shall be transmitted mitted to the clerk of the district court in which the prosecution is pending." Rule 40 (b) (3) (*supra*, p. 4). These steps were followed as to the petitioner.

In the normal case, after a defendant has been admitted to bail under Rule 40, no further process is necessary. Having given a bond for appearance in the district of trial, a defendant appears before that court on the date set for arraignment and on the date of trial. If he does not appear, his bail is forfeited. Rule 46 (f) (1). In addition, by long practice, not specifically covered by the rules, the court of trial may issue a bench warrant for the apprehension of the defendant. The power to issue such warrants has been sustained under the "all writs statute", 28 U.S.C. 1651.[2] As Mr. Justice Reed said

[2] It probably could also be sustained as a new warrant on the indictment under Rule 9.

in ruling on an application for bail by bondsmen of certain defendants who did not appear for service of their sentence, in *Field* v. *United States*, 193 F. 2d 86, 90 (C.A. 2):

> District Courts of the United States have jurisdiction of all offenses against the laws of the United States. 18 U.S.C. § 3231. They "may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651. "The jurisdiction of a court is not exhausted by the rendition of its judgment, but continues until that judgment is satisfied." Wayman v. Southard, 10 Wheat. 1, 23, 6 L.Ed. 253. Under ancient practice bench warrants are issued on indictments to bring defendants before the court for trial, and after violation of bail, either before or after conviction, warrants issue in order that a judgment may be executed. There can be no doubt of the power of the court to direct the bench warrant for the arrest of the four fugitives from justice in the case of Dennis et als.

See also, to the same effect, *Field* v. *United States*, 193 F. 2d 92, 96 (C.A. 2), certiorari dismissed, 342 U.S. 908.

Where a defendant is in the custody of a state, he is in no position to carry out the obligation, which would normally be his, to appear on the date set for trial. His failure to appear is a default of his bond, which is not necessarily excused by reason of the fact that he is in custody. *Taylor* v. *Taintor*, 16 Wall. 366. It is therefore clear that the district court of

the district of trial would have the right to issue a bench warrant for his arrest which could be served anywhere within the jurisdiction of the United States under Rule 4. If the state authorities (in this case, the State of New York) chose to release petitioner under the warrant of arrest or chose to deliver petitioner to the custody of the federal marshal in New York, so that a warrant of arrest could be served, he would then be removed to California for trial.[3]

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[3] It is an open question whether, on arrest under such a warrant at a place more than 100 miles from the place of trial, a defendant would be entitled to a removal hearing. Even before Rule 4 made criminal process run throughout the United States, it had been held that the removal statute did not apply in such a situation and that the court had authority to require the prisoner to be brought directly to it wherever he was arrested. See *In re Christian*, 82 Fed. 885 (C.C. Ark.); *Biddle* v. *Thiele*, 11 F. 2d 235, 236 (C.A. 8); *contra*, *Palmer* v. *Thompson*, 20 App. D.C. 273; *Ex Parte Salinger*, 288 Fed. 752 (C.A. 2). The notes to the rules make it clear that the rules were intended to change the holding of *Palmer* v. *Thompson*, *supra*, that a warrant could be served only in the district where issued. However, since the rules do not deal explicitly with arrest of a defaulting defendant, there is no indication of intent with respect to the necessity of a removal hearing in that situation. The question does not appear to have arisen for determination since the time when Rule 4 made process run throughout the United States and the actual practice, so far as we have been able to determine it, has varied. The District Court of Massachusetts has held that, where a bench warrant issued after conviction, there was no occasion to bring the defendant before a Commissioner because the reasons for doing so [*i.e.*, notification of right to counsel and admission to bail] would not apply. *MacNeil* v. *Gray*, 158 F. Supp. 16 (D. Mass.). This same reasoning would apply to a default in appearance where a defendant has previously had a hearing under Rule 40. In any event, if such a hear-

The district courts have not customarily used a warrant of arrest in the situation where a defendant is known to be in state custody—they have used the writ of *habeas corpus ad prosequendum*, a historical writ known to the law at the time the American courts were established, which was used for the purpose of bringing a prisoner in custody before a court for trial. There is good reason, as well as historical precedent, for this practice. As noted, failure to appear on the date set for trial may work a forfeiture of the defendant's bond, even though his failure is due to custody by another jurisdiction. *Taylor* v. *Taintor*, 16 Wall. 366. It would hardly be fair either to the defendant or to his sureties to have him considered in default when he is willing to appear and the state is willing to let him appear. A court has the right to assume that a defendant is willing to do that which he is legally and contractually (under his bond) obligated to do—*i.e.*, appear for trial on the date set. There is thus no reason to issue a warrant of arrest addressed to the defendant before it is clear that the defendant is in willful default on his obligation. The obstacle to the defendant's carrying out of his obligation is his custody by the state jailer. It is therefore desirable that the court endeavor to remove that obstacle by obtaining the consent of the state to the release of the defendant so that he can carry out his obligation to appear

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ing were required, identity would obviously be the only issue since that is true even when a defendant is originally arrested on the indictment.

for trial. The historical way to do that is by a writ of *habeas corpus ad prosequendum*, which is addressed to the jailer rather than the defendant. A state which has a man in custody will not, of course, merely turn him loose to allow him to proceed to trial on his own. The state authorities will either transport him themselves or turn him over to the United States Marshal for transportation to the district of trial. But, in essence, the function of the writ is to enable a defendant to carry out his legal obligation despite his custody, without being adjudged in default of appearance.

Another reason why the writ *ad prosequendum* is a more desirable means of getting a defendant in state custody to his federal trial than would be the issuance of a bench warrant after default is that use of the writ is less likely to engender conflict between state and federal governments. Without endeavoring to decide what the ultimate decision would be if an issue were raised, it seems evident that an attempt to serve a federal warrant of arrest addressed to a defendant in custody of state prison officials would raise possibilities of conflict in our federal system. Presumably, a state could turn over a defendant to a federal marshal so that a warrant of arrest could be served on him there, but it may reasonably be anticipated that state officials will be less likely to release a defendant to federal authorities without some process addressed to the state, rather than the defendant, which will give the state the assurance that the prisoner will be returned to state custody when the federal trial is completed. The constitutional right

of a defendant to a speedy trial will not be aided if states become reluctant to turn over a defendant because federal courts have no authority to issue process to state custodians.

Neither a defendant[4] nor the administration of justice would gain from a ruling that the long established procedure of bringing a defendant to trial by writ of *habeas corpus ad prosequendum* is beyond the power of the district court. It is our position that such a ruling is not required. In criminal cases, a district court of the United States has jurisdiction throughout the United States for the purpose of bringing a defendant before it for trial. It therefore has power to issue a writ of *habeas corpus ad prosequendum* directed to any custodian anywhere within the United States. Such a writ is within its jurisdiction either under 28 U.S.C. 2241 or by virtue of the all writs statute, 28 U.S.C. 1651. It is also our position that, in any event, since the writ is both in name and in practical effect a process directed to the jailer and not to the defendant, the petitioner is in no position to challenge the writ if the state is willing to honor it.

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[4] The writ of *habeas corpus ad prosequendum* gives a defendant all the rights he would have under a bench warrant after default without the burden of an adjudication of default. This is so even if it is assumed that, under such a warrant, a defendant is entitled to a removal hearing under Rule 40 (see fn. 3, *supra*). As noted, the only issue in such a hearing is identity, and prison officials will not honor such a writ unless they are certain the person charged is the person they have.

II

Since the Writ of Habeas Corpus Ad Prosequendum Is a Method of Bringing a Defendant Before the District Court for Trial, District Courts Have Jurisdiction To Issue Such Writs To Run Anywhere Within the Jurisdiction of the United States.

The petitioner cannot, and does not, deny that district courts of the United States have authority to issue writs of *habeas corpus ad prosequendum* to run within their territorial limits. The writ is clearly one "agreeable to the usage and principles of law" under 28 U.S.C. 1651. It was mentioned by Blackstone (III Blackstone's *Commentaries*, 129-130); and was recognized by this Court as early as 1807 (*Ex Parte Bollman*, 4 Cranch 75, 97-98) and as recently as 1952 (*United States* v. *Hayman*, 342 U.S. 205, n. 35 at 221). See, also, *Price* v. *Johnston*, 334 U.S. 266, 281, and *Ponzi* v. *Fessenden*, 258 U.S. 254. Indeed, as petitioner points out, this use of the writ is recognized by 28 U.S.C. 2241 (c) (5), *supra*, pp. 2-3, which provides that the writ shall not issue with respect to a prisoner unless, as one alternative, it is necessary to bring him "into court to testify or for trial."

The petitioner's argument is a simple one: 28 U.S.C. 1651 (a) provides in pertinent part that writs of habeas corpus may be granted by district courts "within their respective jurisdictions" and the jurisdiction of the District Court for the Southern District of California does not extend to New York. He relies largely on *Ahrens* v. *Clark*, 335 U.S. 188, where this Court held, as to *the writ of habeas corpus ad*

subjiciendum,[5] that a district court had no authority to issue the writ in a situation where the defendant is confined outside its territorial jurisdiction. The petitioner argues that "jurisdiction" for the purposes of that writ recognized by 28 U.S.C. 2241 (c) (1) to (3) must necessarily be the same as "jurisdiction" for the purposes of the writ of *ad prosequendum* recognized by Section 2241 (c) (5).

The fallacy in the petitioner's argument is that Section 2241 (a) requires only that the writ be "within the jurisdiction" of the district court. Since the jurisdiction of district courts in criminal cases, both before the adoption of the Federal Rules of Criminal Procedure and even more after their adoption, is broader than it is in civil cases, the ruling in *Ahrens* v. *Clark* is not controlling here. A proceeding for a writ of *habeas corpus ad subjiciendum* is an independent action, *sui generis*, but civil in character. *Ex Parte Tom Tong*, 108 U.S. 556, 559-560; *Ex Parte Watkins*, 3 Pet. 193, 201-202. The jurisdiction of the district court depends on the applicant's presence within the district. The writ of *habeas corpus ad prosequendum*, on the other hand, is ancillary and auxiliary to pre-existing criminal jurisdiction in the

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[5] The courts have customarily distinguished the various uses to which writs of *habeas corpus* have been put by designating them by characteristic Latin words from the old forms of the writs. Thus, the most important use of the writ, to inquire into the legality of detention, is designated *ad faciendum, ad subjiciendum et recipiendum* (to submit to the court and receive its orders). Black's *Law Dictionary* (4th ed.), p. 837.

district court. It is process designed to secure the necessary physical custody over a prisoner in order to make effective the existing criminal jurisdiction of the court. Where a court already has jurisdiction of an existing cause of action, as here, it is "within" its jurisdiction, at least in criminal cases, to issue the writ as ancillary process whenever such issuance is "necessary or appropriate in aid of [its] jurisdiction." Nothing in *Ahrens* purports to limit the power of courts to issue ancillary process.

This conclusion is confirmed by the derivation of Section 2241 from R.S. 751, 752 and 753 (28 U.S.C. (1940 ed.) 451-453). Only R.S. 752, which was concerned with "writs of habeas corpus for the purpose of an inquiry into the cause of restraint of liberty" (*habeas corpus ad subjiciendum*), contained the limiting phrase "within their respective jurisdictions" on which the decision in *Ahrens* in large part rested. R.S. 751, empowering the district courts to issue "writs of habeas corpus" generally, contained no such limitation, nor did R.S. 753, which, *inter alia*, permitted the issuance of the writ when "necessary to bring the prisoner into court to testify." The Reviser's Notes state that these provisions were consolidated into Section 2241 "with changes in phraseology necessary to effect the consolidation." See H. Rep. 2646, 79th Cong., 2d Sess., p. A169; H. Rep. 308, 80th Cong., 1st Sess., p. A177. There is no suggestion of any intention that, by the present language empowering judges to grant writs of habeas corpus generally "within their respective jurisdictions", the revisers intended to narrow the authority to issue ancil-

lary writs of habeas corpus, which had generally been assumed to extend outside the district.[6]

The jurisdiction of district courts in criminal cases, with respect to process necessary to bring a defendant before the court, was never as narrow as the petitioner would have it appear. It is true that, before the adoption of the Rules, conflicting views had been expressed as to whether district courts had power to issue warrants which would be effective beyond the territorial limits of the district. Cf. *Biddle* v. *Thiele*, 11 F. 2d 235 (C.A. 8), and *In re Christian*, 82 Fed. 885 (C.C. Ark.), with *Palmer* v. *Thompson*, 20 App. D.C. 273, and *Mitchell* v. *Dexter*, 244 Fed. 926 (C.A. 1). But the procedure for backing a warrant, *i.e.*, for having it reissued by the magistrate of the district where the warrant was to be executed by a police officer of that district, was part of the English practice in relation to justices of the peace (see Black's *Law Dictionary* (4th ed.), under "back", p. 175), and thus was part of generally known practice in criminal cases. And, even so, it may be noted, the court in the *Palmer* case expressed the view that a marshal in the district where a warrant issued might have authority to go outside his own district to effectuate an arrest where this was essential.

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[6] It has long been the practice for district courts to issue writs of *habeas corpus ad prosequendum* to state custodial officials beyond their territorial limits. See, *e.g.*, *Taylor* v. *United States*, 238 F. 2d 259, 260-261 (C.A. D.C.); *United States ex rel. Moses* v. *Kipp*, 232 F. 2d 147, 149-150 (C.A. 7); *Strewl* v. *McGrath*, 191 F. 2d 347 (C.A. D.C.), certiorari denied, 343 U.S. 906; *Hill* v. *United States*, 186 F. 2d 669, 670, 671 (C.A. 10).

What is more important is that, long before the adoption of the Rules, it was established that a district court of the United States, faced with the necessity of bringing a corporate defendant to trial, could issue a summons and have it served on the appropriate corporate officer, even though there was no statutory provision for such process, and even though the corporation was not doing business within the territorial limits of the district court. *United States* v. *John Kelso Co.*, 86 Fed. 304 (N.D. Cal.); *United States* v. *Standard Oil of Indiana*, 154 Fed. 728 (W.D. Tenn.). These cases and others to the same effect were noted with apparent approval by this Court in *Albrecht* v. *United States*, 273 U.S. 1, 8. The courts found the authority for such summons and its service in the all writs statute, reasoning that, in the absence of any statutory provision for obtaining jurisdiction over a corporate defendant, the court could resort to any appropriate means for that purpose. As the court said in *Kelso*, 86 Fed. at p. 307:[7]

> The court having general jurisdiction to try the defendant for its alleged violation of the law under consideration may, as a necessary incident to such jurisdiction, issue any appropriate writ for the purpose of bringing the defendant before it to answer to such charge. * * *

And again (86 Fed. at p. 308):

> It was necessary in the pending case that jurisdiction over the defendant should be acquired,

[7] This language was quoted with approval in the *Standard Oil* case, *supra*, in ruling on the right to serve a corporation outside the district.

> and, as Congress had made no specific provision as to the manner in which this should be done, the court had the right to resort to any appropriate method for that purpose. * * *

The Federal Rules of Criminal Procedure do not, as the petitioner argues, enlarge the jurisdiction of district courts in criminal cases. Rather, they embody and make explicit in certain defined situations the pre-existing view, exemplified by the corporate summons cases, that in criminal cases district courts of the United States may, agreeably to established usage, issue such process as is necessary to acquire jurisdiction of the defendant. Insofar as the Rules deal specifically with the most common means of bringing a person into court—warrant and subpoena—they make explicit the fact that criminal jurisdiction is to run throughout the United States. Rule 4 and Rule 17. But the fact that, as noted, the rules do not deal at all with the procedure to be followed to bring before the court a defendant who is in default of appearance does not mean that a district court of the United States is without jurisdiction to issue process necessary to bring before it for trial an indicted defendant who is in custody out of the territorial limits of the court. District courts of the United States have the authority, and hence the jurisdiction, to use established writs [8] when necessary to

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[8] There seems to be no question that in English practice, as it existed at the time of the Constitution, no problem of territorial limits could have been involved. Both I Chitty's *Criminal Law* (1847), p. 132, and IV Bacon's *Abridgement* (1852), p. 566, which refer, not to the writ *ad prosequendum*,

bring a defendant before them so that the courts can perform their duty of trying the indictment returned by a grand jury. The writ of *habeas corpus ad prosequendum* is a means of getting a defendant, who would otherwise be in default, before the court for trial. The same "jurisdiction" which permitted service on a corporate defendant, the same "jurisdiction" which is reflected in Rule 4 and Rule 17, applies to give the courts "jurisdiction" to issue the writ of habeas corpus to a custodian outside their territorial limits when that is necessary to bring a defendant to trial.

In *Adams* v. *McCann*, 317 U.S. 269, this Court, in holding that circuit courts of appeals possess the authority under Section 262 of the Judicial Code (now 28 U.S.C. 1651, *supra*) to issue writs of *habeas corpus ad subjiciendum* as auxiliary aids to existing appellate jurisdiction with respect to a pending matter, stated (317 U.S. at 273):

> Procedural instruments are means for achieving the rational ends of law. A Circuit Court of Appeals is not limited to issuing a writ of *habeas corpus* only when it finds that it is "necessary" in the sense that the court could not otherwise physically discharge its appellate duties. Unless appropriately confined by Congress, a federal court may avail itself of all auxiliary writs as aids in the performance of its duties, when use of such historic aids is calculated in its sound judgment to achieve the ends of justice entrusted

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but to a similar writ, *deliberandum et recipiendum*, state that its purpose was to deliver a prisoner from one district to another, as from England to Ireland.

> to it. Undoubtedly, therefore, the Circuit Court of Appeals had "jurisdiction," in the sense that it had the power, to issue the writ as an incident to the appeal then pending before it. * * *

This Court subsequently construed Section 262 of the Judicial Code to permit courts of appeals to issue writs "in the nature of habeas corpus", in aid of existing appellate jurisdiction in a case, for the purpose of bringing up prisoners in order that they might argue their respective appeals before the circuit courts. *Price* v. *Johnston*, 334 U.S. 266, 279-283. In *Price*, this Court held that such a writ could be issued "where its use is calculated, in the sound judgment of the [court], to achieve the ends of justice entrusted to it", and that the mere fact that none of the common law writs of habeas corpus had been devised for the particular purpose of producing a prisoner to argue his appeal was immaterial; the all writs section was held to be not "an ossification of the practice and procedure of more than a century and a half ago", but, rather, "a legislatively approved source of procedural instruments designed to achieve 'the rational ends of law.'" *Id.*, at 282. Moreover, the Court emphasized that "[t]he historic and great usage of the writ, regardless of its particular form, is to produce the body of a person before a court for whatever purpose might be essential to the proper disposition of a cause." *Id.*, at 283. These principles, which permitted the issuance of writs of *habeas corpus ad subjiciendum* and writs "in the nature of habeas corpus" as aids to the exercise of appellate (*i.e.*, subject matter) jurisdiction, clearly support use of the

writ of *habeas corpus ad prosequendum* at bar, which is in aid of the criminal subject matter jurisdiction of the district court over the crimes charged in the indictment.

It is significant that this Court, in *Price, supra*, did not suggest that there would be a lack of jurisdiction in the courts of appeals to issue the "writ in the nature of habeas corpus" there involved if the prisoner was confined outside of the territorial jurisdictions of the respective circuit courts, nor did this Court allude to the respective territorial jurisdictions of the circuit courts in providing that they possessed the authority to issue the writ there in question. Indeed, the broad language used by this Court in *Price, supra*, 334 U.S. at 279-283, 284, supports the notion that the writ in that case would be issuable outside of the territorial jurisdictions of the respective circuit courts, especially when it is noted that a prisoner is oftentimes removed to a federal penitentiary outside of the territorial jurisdiction of the circuit court while his appeal is pending in the circuit court.[9]

In *United States* v. *Hayman*, 342 U.S. 205, this Court upheld the power of district courts to issue orders for the production of prisoners confined outside of their respective territorial limits in proceed-

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[9] For example, District of Columbia prisoners confined in the Federal Penitentiary at Lorton, Virginia, are outside of the territorial jurisdiction of the Court of Appeals for the District of Columbia Circuit, in which court an appeal from a conviction in the District Court for the District of Columbia may be lodged.

ings pursuant to 28 U.S.C. 2255, stating (342 U.S. at 220-221):

> This is not a habeas corpus proceeding. The sentencing court in the Southern District of California would not be issuing an original writ of habeas corpus to secure respondent's presence from another district. Issuance of an order to produce the prisoner is auxiliary to the jurisdiction of the trial court over respondent granted in Section 2255 itself and invoked by respondent's filing of a motion under that Section.
>
> The very purpose of Section 2255 is to hold any required hearing in the sentencing court because of the inconvenience of transporting court officials and other necessary witnesses to the district of confinement. The District Court is not impotent to accomplish this purpose, at least so long as it may invoke the statutory authority of federal courts to issue 'all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.' An order to secure respondent's presence in the sentencing court to testify or otherwise prosecute his motion is 'necessary or appropriate' to the exercise of its jurisdiction under Section 2255 and finds ample precedent in the common law. * * *

That reasoning applies here. If the district courts are authorized to issue extraterritorial orders pursuant to Section 1651 for the production of prisoners in aid of their subject matter jurisdiction under Section 2255, so in criminal cases the district court is authorized under Section 1651 (the all writs provision) to aid its subject matter jurisdiction over the crimes charged in the indictment by issuing the

extraterritorial writ in question. See *Downey* v. *United States*, 91 F. 2d 223, 227 (C.A. D.C.).

In each case, the extraterritorial process is designed to secure the presence of the prisoner before the court in aid of pre-existing subject matter jurisdiction. If this power stems from the fact the Section 2255 proceeding contemplates the presence of the prisoner in many instances, so here, to a greater degree, the indictment requires the presence of the petitioner. Hence, Section 1651 authorizes the issuance of extraterritorial process in aid of that criminal subject matter jurisdiction. No other conclusion from *Hayman* can logically be reached. The petitioner's claim that Section 2255 contains within itself the exception to the general rule as to territorial limitation (Pet. Br. 13) not only disregards the wording of 28 U.S.C. 2255, which does not provide for extraterritorial issuance of orders for the production of prisoners, but ignores the decision in *Hayman*, *supra*, that the district courts are not impotent to implement their 2255 jurisdiction by issuing extraterritorial orders for production of prisoners so long as they can invoke the provisions of Section 1651. True, Congress intended that the 2255 hearings, which might often necessitate the presence of the prisoner, would be conducted in the sentencing court. But Congress did not specifically provide in 28 U.S.C. 2255 for the issuance of extraterritorial orders for the production of prisoners in the sentencing courts. That authority was found by this Court in Section 1651. So here, Congress intended the petitioner to be tried and the Constitution gives him a right to a

speedy trial. The district court may therefore use Section 1651 in order to effectuate the trial. As the court below stated (277 F. 2d at 436), in reasoning from *Hayman, supra*, "We believe that in this case the District Court is not impotent to bring before it for trial a defendant who has been indicted by that Court, who has entered a plea of not guilty in that Court, and who at his request has gone to the State of New York, and whose presence is now required in the Southern District of California for the purpose of proceeding with the prosecution against him."

Moreover, the instant case is a much stronger one than *Hayman* in a number of respects:

(1) Issuance of an extraterritorial order for the production of a prisoner in a Section 2255 proceeding, which is civil in nature, is somewhat unusual in the light of the fact that process in civil proceedings is customarily more closely restricted. See Rules 4 and 45, F.R. Civ. Proc. In the instant case, the writ is issued in aid of criminal jurisdiction in a case before the court, and is analogous to an arrest warrant which runs throughout the United States. The writ of *habeas corpus ad prosequendum* and the arrest warrant serve the same function of securing physical custody over a defendant for the purpose of answering criminal charges in the district courts. Thus, the long standing practice of issuing writs of *habeas corpus ad prosequendum* to state custodians outside of the territorial jurisdiction of the district court comports more fully with the nationwide validity and effect of process issued by the district courts in aid of criminal subject matter jurisdiction.

(2) Issuance of the extraterritorial writ of *habeas corpus ad prosequendum* in the present case is more "necessary" than in *Hayman*. In a criminal proceeding, the court is powerless to proceed with the exercise of its jurisdiction unless the accused, whether produced in court by a writ of *habeas corpus ad prosequendum*, arrest warrant or otherwise, is physically present in court and in most cases, where the offense is committed in one district, there can be trial only in that district. In Section 2255 proceedings, however, the district court can oftentimes proceed to exercise its jurisdiction in a matter before it without the physical presence of the prisoner, and, to the extent that it cannot, there could be a remedy by habeas corpus in the district of confinement.

(3) The long-standing use of the writ of *habeas corpus ad prosequendum*, both in this country and England, serves to meet the requirement of Section 1651 that the writ be "agreeable to the usages and principles of law" even more clearly than does the extraterritorial order for the production of a prisoner in the relatively recent Section 2255 jurisdiction of the district courts.

(4) Finally, there is a greater need for issuance of extraterritorial process designed to secure the physical custody of a defendant in aid of criminal jurisdiction of the district courts than there is for issuance of extraterritorial orders for production of prisoners in Section 2255 proceedings. The prisoners in the Section 2255 proceedings have been legally convicted and have had opportunities for appellate review. In the instant case, however, the petitioner has not been

convicted in the District Court. He has a constitutional right to a speedy trial in the district where the alleged crime was committed. As explained above in Point I, *supra*, the writ is the most appropriate way of effectuating that right and bringing the defendant to trial.[10]

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[10] The petitioner's reliance on *Edgerly* v. *Kennelly*, 215 F. 2d 420 (C.A. 7), certiorari denied, 348 U.S. 938, and *Goldberg* v. *Hoffman*, 225 F. 2d 463 (C.A. 7), is misplaced. *Edgerly*, a civil suit for damages, in which the subpoena power is more limited, and *Goldberg*, a mandamus proceeding, are clearly unrelated to the present case where the writ *ad prosequendum*, similar to an arrest warrant which has nation-wide effect, was issued in aid of *criminal* jurisdiction. Moreover, the same circuit court, by holding that it would be a breach of comity and faith if the District Court for the Northern District of Illinois did not return a Michigan prisoner to the state authorities pursuant to representations made in a writ of *habeas corpus ad prosequendum* to the Michigan authorities, impliedly recognized the extra-territorial issuance of the writ of *habeas corpus ad prosequendum*. *United States ex rel. Moses* v. *Kipp*, 232 F.2d 147 (C.A. 7). Nor does *United States* v. *Kniess*, 251 F. 2d 669 (C.A. 7), help the petitioner. In that case, the court merely held that it lacked the authority to issue a writ of *habeas corpus ad subjiciendum* beyond its territorial jurisdiction. In *Taylor* v. *McGrath*, 194 F. 2d 882 (C.A. D.C.), on which the petitioner also relies, the court merely held that mandamus was not a substitute for habeas corpus, and that, in any event, the petitioner was not entitled to a writ of *habeas corpus ad subjiciendum* because he was outside of the court's territorial jurisdiction.

In *Phillips* v. *Hiatt*, 83 F. Supp. 935 (D. Del.), and *In the Matter of Karol Van Collins*, 160 F. Supp. 165 (D. Me.), federal prisoners, confined outside of the respective territorial jurisdictions of the district courts pursuant to other convictions, sought writs of *habeas corpus ad prosequendum* in the districts where indictments were then pending against them on other federal charges. In denying the relief requested, the district courts held that neither 28 U.S.C. 2241

III

The Petitioner Has No Standing To Challenge the Authority of the District Court To Issue the Writ In Question

As explained in Point I, *supra*, the function of the writ *ad prosequendum* is to enable a petitioner, who is in custody, to accomplish without default that which he is legally under a duty to do without further process of any kind, *i.e.*, appear for trial under an indictment to which he has pleaded not guilty. If a petitioner is not in jail, no process issues against him until after he has failed to appear. Hence the writ in this case, which is addressed to the custodian, and not to the petitioner, is not a substitute for process.[11] Under these circumstances, in our view, petitioner has no standing to challenge the power of the court to issue the writ to his custodian.[12]

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nor Section 1651, *supra*, conferred authority on them to issue the writs to run beyond their respective territorial jurisdictions. For all the reasons developed above, we believe the expressed bases for these decisions are wrong although they are factually distinguishable from the present case.

[11] In this respect, the writ *ad prosequendum* differs from a writ *ad testificandum* which is often used as a substitute for a subpoena as the process informing a witness of his duty to testify. We think it is better practice to issue a subpoena to a witness and the writ to the custodian, so that the witness may exercise whatever rights he might have to move to quash the subpoena. If no subpoena is served, it may be argued that the witness could contest the writ *ad testificandum* on any ground which would be available as to a subpoena. That question, of course, is not here.

[12] While the government did stipulate on oral argument that the appeal itself should be submitted to the court on the merits, that stipulation was made only to expedite the ap-

It is well established that, where one sovereign has custody of a prisoner, it may transfer him to another, and that this is a matter of comity between the sovereigns, as to which the prisoner has no standing to complain. *Ponzi* v. *Fessenden*, 258 U.S. 254, 260-262; see *United States ex rel. Buchalter* v. *Warden of Sing Sing Prison*, 141 F. 2d 259, 260 (C.A. 2) (where the Federal Government, which was the sovereign of prior jurisdiction, turned the relator over to the State of New York for electrocution). This principle has been applied even where the claim was made that the sovereign of prior jurisdiction had not consented to the physical taking of its prisoner (see, *e.g.*, *United States ex rel. Spellman* v. *Murphy*, 217 F. 2d 247, 252 (C.A. 7); *Rawls* v. *United States*, 166 F. 2d 532, 534 (C.A. 10), certiorari denied, 334 U.S. 848).

In *Ponzi* v. *Fessenden*, 258 U.S. 254, this Court unanimously held that the United States, acting through the Attorney General, was permitted to surrender a federal prisoner to the State of Massachusetts pursuant to a writ of *habeas corpus ad prosequendum*, issued out of the state court to the prisoner's federal custodians, and that when delivered up under such process the State of Massachusetts could lawfully prosecute the prisoner in its courts. Mr. Chief Justice Taft, speaking for the Court, stated (258 U.S. at 259-260):

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peal. It was not intended to be a waiver or abandonment of the standing argument. The motion to dismiss the petitioner's appeal, which included the standing argument, was submitted to the court below.

> One accused of crime has a right to a full and fair trial according to the law of the government whose sovereignty he is alleged to have offended, but he has no more than that. He should not be permitted to use the machinery of one sovereignty to obstruct his trial in the courts of the other, unless the necessary operation of such machinery prevents his having a fair trial. He may not complain if one sovereignty waives its strict right to exclusive custody of him for vindication of its laws in order that the other may also subject him to conviction of crime against it. * * * Such a waiver is a matter that addresses itself solely to the discretion of the sovereignty making it and of its representatives with power to grant it.

The Court held that the Attorney General was authorized to surrender temporary custody of a federal prisoner to a state for purposes of trial, and that confinement in the penitentiary does not make the prisoner immune from subsequent prosecution. These principles serve to establish lack of standing in this petitioner. Since the petitioner is not permitted to challenge the surrender of jurisdiction over him by the state (see *supra*, p. 31), it follows that he is not permitted to challenge the means (the writ) by which the state's surrender is obtained. The state is merely permitting the petitioner to carry out his separate, independent obligation to appear for federal trial. Whether the transfer from state to federal authority is effectuated by oral agreement, an informal document, or a writ *ad prosequendum*, the petitioner cannot challenge the transfer. There is

thus no reason why he should have standing to question a writ issued by the district court which the state authorities, to which it is addressed, are willing to honor.

The fact that the petitioner is in state prison ought not to give him greater rights than he would have if he were not in prison at all. If the petitioner were not in prison, he would be under a duty to appear in California. The fact that the state is willing to let him fulfill that duty is not a matter about which he can complain.

CONCLUSION

It is respectfully submitted that the judgment below should be affirmed.

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IN THE

Supreme Court of the United States

October Term, 1960
No. 72.

PAUL JOHN CARBO,

Petitioner,

vs.

UNITED STATES OF AMERICA.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

PETITIONER'S REPLY BRIEF.

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IN THE

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PETITIONER'S REPLY BRIEF.

I.
Comment Upon Respondent's Introduction (Resp. Br. 8-15).

This must be kept in mind: although the particular factual situation in the case at bar is that of a writ of *habeas corpus ad prosequendum* issued extraterritorially by a district court concerning a prisoner who is in state custody, the legal question involved—whether the court has power to issue such an extraterritorial writ—is the same whether the prisoner is in federal or state custody. The question is one of jurisdiction—jurisdiction to issue process, absent Congressional sanction, outside the territorial jurisdiction of the court. To suggest unlikely situations but instances which will

illustrate the point, the problem is similar to that in which a federal district court in New York before which no suit had been filed, issues an order on its own ordering the transfer of a suit to it which suit had been filed in the federal district court in California,[1] or a case in which a federal district court in Nebraska ordered transferred to it the trial of a traffic case from a state court of Alabama. In neither suggested case would the district court have jurisdiction to make such an order. So the fact that here petitioner is in state custody is not a significant factor to the legal question involved in this case.

Petitioner is not seeking to defeat any power which the district court rightfully has. The question of the power of the district court to *try* petitioner is not involved in this case. The question involved is the simple one of the authority of the district court to issue the extraterritorial order which it did, an authority which, petitioner says, it did not and does not have. That is all that is before this Court. "The question is one of power, and not of the expediency of its exercise in the particular case, . . ." (*McGowan v. Moody*, 22 App. D.C. 148, 158 [1903].)[1a] "The question is not, whether Congress might, within the terms of the Constitution, have conferred this power on the Courts of the United States, in cases of this nature; but, have they done it?" (*Ex parte Cabrera*, 1 Wash. Rep. 232 [CC 3 1805]).

Accordingly, respondent's reliance (Br. 9-11) upon analogies to different processes (arrest and bench war-

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[1]Not a 28 U.S.C. 1406 situation.

[1a]This case was cited by this Court in *Ahrens v. Clark*, 335 U.S. at 190, with apparent approval.

rants) applicable to different factual situations (removal and forfeiture of bail) is of no assistance here.[2]

Nor does respondent's concern (Br. 11-14) for a possible forfeiture of petitioner's bond and its efforts to assist him in performing his contractual obligation supply the missing power. In the first place, what would be the legal procedure and the power of the court *in the event* of a default or forfeiture of the bond is not the problem in the case at bar. Secondly, it is far from clear—indeed the law is just to the contrary in a situation such as here—that there could be a forfeiture of the bond where the defendant left the jurisdiction of the court with the court's consent. In the very case (*Taylor v. Taintor*, 16 Wall. 366) cited by respondent (pg. 11), this Court said by way of dictum that there could not be a forfeiture in such a situation (16 Wall. 366, 21 L. ed. 287, 291). While in *Peckham v. Henkel*, 216 U.S. 483, such was the holding, as it was in *United States v. Vendetti*, 33 F. Supp. 34 (D. Mass. 1940).[3] In the case at bar, of course, petitioner not only left the district with the court's consent [R. 11, 25], but the court knew that at that very moment petitioner was in state confinement under a two year sentence [R. 24].

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[2]Incidentally, it is not accurate, as stated by respondent (Br. 10), that in a removal proceeding where the defendant is entitled to a hearing, the sole issue which may be contested is the identity of the defendant. *United States v. Parker*, 14 FRD 146 (DC DC 1953) and *United States v. Parker*, 14 FRD 447 (DC DC 1953) are examples of cases where other matters were gone into in the removal hearing and removal denied. *Cf. United States v. Wright*, 14 FRD 184 (D. Haw. 1954).

[3]Moreover the *Taylor* case, on analysis, does not stand for the proposition for which it is cited by respondent. It appears that defendant there was supposed to appear for trial in Connecticut on the third Tuesday of October, 1866. Reference to the calendar

As indicated at the outset of this Reply, respondent's reference (pg. 14) to the desirability of the use of the writ of *habeas corpus ad prosequendum* in a case such as this because of a possible conflict between state and federal governments does not assist here. The same problem of extraterritorial jurisdiction—or, rather, the lack thereof—is present where the defendant is in federal custody. And solicitude for a defendant's right to a speedy trial (*Cf.* Resp. Br. 15) did not supply the missing jurisdiction in *Phillips v. Hiatt*, 83 F. Supp. 935 (D Del. 1949) nor in *In the Matter of Karol Van Collins*, 160 F. Supp. 165 (D. Me. 1958) where reliance on that constitutional right was the precise ground for petitioners' argument to those courts.

Respondent assumes the very question to be decided when it says (pg. 15): "In criminal cases a district court of the United States has jurisdiction throughout the United States for the purpose of bringing a defendant before it for trial. It *therefore* (italics added) has power to issue a writ of *habeas corpus ad prosequendum* directed to any custodian anywhere within the United States."

The distinction which respondent seeks to make between criminal and civil cases does not assist here. The broader power a district court has with respect to subpoenas and warrants of arrest in criminal cases is there

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discloses that this was October *16*, 1866. Defendant did not appear, but he was not taken into custody by the New York authorities on the request of the Maine governor until October *19*, 1866. (16 Wall. 366, 21 L. ed. at 289). Accordingly, on and before the day defendant was to appear in Connecticut, he was not in custody. The case, therefore, though cited for the proposition that when a defendant leaves the jurisdiction without court consent and cannot return for trial because he is incarcerated, bail may be forfeited, does not actually support such a ruling because that was not the factual situation in the case.

only because Congress made *specific exceptions* as to *such* process. When Congress wishes the district courts to have extraterrotorial powers, whether the matters be criminal *or* civil, it knows how to say so and does. Thus, in connection with certain types of civil proceedings under the Sherman Act, Congress has provided for nationwide subpoena power (15 USC 5, 10, 25 and see 15 USC 22).[4]

The point is that, under settled principles of law, a district court has no power to speak extraterritorially unless given such power explicitly by Congress. Congress has given the district courts no power to issue extraterritorial writs of *habeas corpus ad prosequendum*. Neither of the statutes relied upon by respondents does so. Indeed, as we shall show, 28 USC 2241 expressly negates such power under that section, and, by reason of the legislative history, likewise negates the power under 28 USC 1651, even aside from the settled rule that the latter section does not and never was intended to extend the territorial jurisdiction of the court.

We will discuss the question of petitioner's right to challenge the district court's jurisdiction at the conclusion of this Reply.

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[4] *E.g.* 15 USC 10:

"Whenever it shall appear to the court before which any proceeding under section 9 of this title may be pending, that the ends of justice require that other parties should be brought before the court, the court may cause them to be summoned, whether they reside in the district in which the court is held or not; and subpoenas to that end may be served in any district by the marshal thereof."

And in the Food and Drug Act, it is provided (21 USC 337):

"All such proceedings for the enforcement, or to restrain, violations, of this chapter shall be by and in the name of the United States. Subpoenas for witnesses who are required to attend a court of the United States, in any district may run into any other district in such proceeding."

II.

A District Court Has No Power to Issue an Extraterritorial Writ of Habeas Corpus ad Prosequendum (Reply to Resp. Point II, pp. 16-29).

Because the writs of *habeas corpus ad subjiciendum* and *ad prosequendum* perform different functions, respondent contends that as to the latter the district courts have extraterritorial jurisdiction even though, concededly, as to the former, they do not. The theory seems to be that *ad prosequendum* is an "auxiliary" writ and therefore, somehow, the well-settled, historical rule that absent "specific exceptions created by Congress the jurisdiction of the district courts is territorial," does not apply. In so doing, respondent misunderstands the excerpt it quoted (Br. 23) from *Price v. Johnston*, 334 U. S. 266, 283, that "(t)he historic and great usage of the writ, *regardless of its particular form*, is to produce the body of a person before a court for whatever purpose might be essential to the proper disposition of a cause." (Italics added.) Rather than support an inference that this language means that the District Courts are given a different territorial jurisdiction as regards the two writs, the correct conclusion, we submit, is that the court's territorial jurisdiction to issue the writ, *regardless of its particular form*, is the same.

Respondent does not make clear in its reasoning (pg. 18) whether this asserted extraterritorial jurisdiction is posited on the argument that the "within their respective jurisdictions" clause of 28 USC 2241 is, by itself, to be interpreted as meaning extraterritorial, or whether the extraterritorial power must be derived from a combination of 2241 and 28 USC 1651, the latter because of the "necessary or appropriate in aid of their respective jurisdictions" language in that section. For clarity

of understanding, we will discuss first our thesis that the "within their respective jursidictions" clause of 2241 means territorial jurisdiction and since Congress has made no specific exception thereto, the district court has no extraterritorial power. We will then discuss how 28 USC 1651 gives no extraterritorial power. Indeed, we will show that because of Congress' action in 1948 in adding to the habeas corpus section the "for trial" provision of 28 USC 2241(c)(5), section 1651 does not apply at all and affords no power to the district court to issue writs of *habeas corpus ad prosequendum.*

A.

There Is No Such Power Under 28 USC 2241.

Respondent refers (Br. 18-19) to the statutory format prior to the consolidation into and enactment of section 2241, points out that 2241 was derived from R.S. 751, 752 and 753 (28 USC [1940 ed.] 451-452; see Appx. F to Petitioner's Open. Br.), that only 752 contained the language "within their respective jurisdictions", and concludes that, therefore, when Congress consolidated the sections into 2241 there was no intention to narrow the authority to issue, what respondent calls, ancillary writs of habeas corpus which have "generally" been "assumed" to extend outside the district. But respondent's historical analysis is not complete, nor does it go back far enough.[5] Before considering this,

[5]Moreover, one of the very cases (*Ponzi v. Fessenden*, 258 U.S. 254) upon which respondent relies (pg 16) is authority for the territorial limitation of R.S. 753 relating to writs of habeas corpus *ad testificandum* and *ad prosequendum* and hence of the same territorial limitation of 28 USC 2241 (c)(5). There this court said (258 U.S. at 261): "Under statutes permitting it, he (the prisoner) might have been taken, under the writ of habeas corpus to give evidence in a Federal court, or to be tried there, *if in the same district* (§753, Rev. Stat. Comp. Stat. §1281, 3 Fed. Stat. Anno. 2d ed. p. 462), . . ." (Italics added.)

however, we point out the obvious: extraterritorial jurisdiction to a district court cannot be "assumed". The rule is, as we have stated before and as is so clear, that *unless* Congress creates a specific exception, the district court's power is simply territorial; that's all and no more (*Ahrens v. Clark*, 335 U.S. at 190; *Georgia v. Pa. R. Co.*, 324 U.S. 439, 467; cf 28 USC 84 and 132). Respondent would like that rule to be evanescent, and it acts as if the rule were non-existent. The fact that there has been an "assumption" of power does not establish the existence of such power. (*Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 136)[6]

As we mentioned before, respondent did not go back far enough in its consideration of the legislative history precedent to section 2241.

As originally passed, the "all writs" statute and the *habeas corpus* statutes were in one and the same place: §14 of the Judiciary Act of 1789; 1 Stat 81. There-

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[6]All of the cases cited by respondents (f.n. 6, pg. 19) in support of its assertion that prior to the 1948 consolidation into section 2241 the courts had "generally assumed" that jurisdiction to issue writs of *habeas corpus ad prosequendum* extended outside the district, are post 1948 cases; two (*Streck v. McGrath*, 191 F. 2d 347 and *Hill v. United States*, 186 F. 2d 669) being in 1951, and the other two (*Taylor v. United States*, 238 F. 2d 259 and *U.S. ex rel. Moses v. Kipp*, 232 F. 2d 147) being in 1956. Accordingly they can hardly be said to support the proposition that there was any reliance on them when Congress acted in 1948. Moreover, in none of these cases was any question raised as to the power of the court to issue the writ extraterritorially. And, as already mentioned, the cases which have specifically passed upon the question have not only not "assumed" that there was extraterritorial jurisdiction but, on the contrary, have held that there was not such jurisdiction even in aid of the constitutional right to a speedy trial. (*Phillips v. Hiatt*, 83 F. Supp. 935 [D. Del. 1949]; *In the Matter of Karol Van Collins*, 160 F. Supp. 165 [D. Me. 1958]; *cf. Edgerly v. Kennelly*, 215 F. 2d 420 [CA 7 1954.])

after, various amendments were made to the habeas corpus section of the Judiciary Act all to the effect of adding to the power of the courts. See Appendix F to Petitioner's Opening Brief.[7]

The thrust of these various changes was to add progressively to the courts' powers concerning habeas corpus, because the law was and is crystal clear, as set forth by this Court in *Ex parte Bollman,* 4 Cranch 75, 93-94, that

> ". . . (C)ourts which are created by written law and whose jurisdiction is defined by written law, cannot transcend that jurisdiction . . . for the meaning of the term habeas corpus, resort may unquestionably be had to the common law; but *the power to award the writ* by any of the courts of the United States *must be given by written law.*" (Italics added.)

The *Bollman* case described the various forms and purposes of the writ of habeas corpus, including *ad prosequendum* (4 Cranch at 98).

The succeeding changes in the habeas corpus provision of the Judiciary Act of 1789 (§14; 1 Stat. 73, 81) are related in *Cunningham v. Neagle,* 135 U.S. 1, 34 L.ed. 55, 73-74.[8] Thus, the federal court's power to issue writs of habeas corpus under the first Judiciary Act was limited to those situations where the person was in jail or custody under or by authority of the

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[7]For the convenience of the Court and counsel we set out as Appendix A hereto in capsule form the pertinent substance of the various amendments to §14 of the 1789 Act up to today's 28 USC 2241 and 1651.

[8]*Cf.* Appendix F to Petitioner's Opening Brief, and Appendix A hereto.

United States or committed for trial before some court of the same or when necessary to be brought into court to testify (*Cunningham v. Neagle,* 34 L.ed. at 73; 1 Stat. 81).

Since the power thus given did not authorize habeas corpus where the states imprisoned federal officers for attempting to enforce the federal tax laws, the act was amended in 1833 to give power to the federal courts to issue the writ where such a prisoner was confined by reason of such conduct (*Cunningham v. Neagle,* 34 L.ed. at 74; 4 Stat. 634).

Then, in 1842, a further extension of the federal courts' power was made to permit the writ where the custody was under the sanction of a foreign power and the validity thereof depended upon the law of nations (*Cunningham v. Neagle,* 34 L.ed. at 74; 5 Stat. 539).

The fourth extension was in 1867. In effect, it granted the federal courts the broad power, now extant, to issue writs of habeas corpus, and included all cases of restraint in violation of the Constitution or laws or treaties of the United States (*Gunningham v. Neagle,* 34 L.ed. at 74; 14 Stat. 1867).

Thus stood the format of the habeas corpus and "all writs" statutes at the time of the Revised Statutes in 1875: the power to issue "all writs" and the power to issue habeas corpus to bring a prisoner into court to testify or when he was in custody under authority or color of the United States were in one statute (1 Stat. 81) and successive extensions and amendments were made in 1833 (4 Stat. 634), 1842 (5 Stat. 539) and 1867 (14 Stat. 385). It was because Congress had not given the courts power to issue habeas corpus for these

added purposes, that Congress had to pass the specific legislation.[9]

The phrase, "within their respective jurisdictions" first appears in the 1867 amendment which was the passage of H.R. 605 of the 39th Congress. The bill was specifically denominated as being "to amend an act to establish the judicial courts in the United States, approved September 24, 1789." (Part 1, Cong. Globe, 39th Cong. 2d Sess. pg. 730). As first introduced, the bill did not have the qualifying phrase (ibid). The debate in the Senate[10] makes clear that while the chairman of the committee in charge of the bill felt the bill was not subject to extraterritorial construction,[11] the qualifying

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[9]*Cf. Ex parte Dorr*, 3 How. 103, 105, 11 L. ed. 514, 515:

"The power given to the courts, in this section, to issue writs of *scire facia*, *habeas corpus*, &c., as regards the writ of *habeas corpus*, is restricted by the proviso to cases where a prisoner is 'in custody under or by color of the authority of the United States, or has been committed for trial before some court of the same, or is necessary to be brought into court to testify.' This is so clear, from the language of the section, that any illustration of it would seem to be unnecessary. The words of the proviso are unambiguous. They admit of but one construction. And that they qualify and restrict the preceding provisions of the section is indisputable.

"Neither this nor any other court of the United States, or judge thereof, can issue a *habeas corpus* to bring up a prisoner, who is in custody under a sentence or execution of a State court, for any other purpose than to be used as a witness. . . ."

[10]There was apparently none reported as to the House, the House simply concurring in the Senate's amendment to add the words (Part 2, Cong. Globe, 39th Cong., 2d Session, pg. 899).

[11]"Mr. Trumbull.

"When this bill was up the other day the Senator from Maryland suggested that under it a judge of a United States court in one part of the Union would be authorized to issue a writ of habeas corpus to bring before him a person confined in another and a remote part of the Union. I do not think the bill is susceptible of that construction. I think the judges and courts would under the bill be confined to their respective jurisdictions; . . ." (Part 2, Cong. Globe, 39th Cong. 2d Sess. pg. 790).

phrase was inserted so as to remove any doubt thereof (Part 1, Cong. Globe, 39th Cong., 2d Sess, pg. 730; Part 2, Cong. Globe, 39th Cong., 2d Sess., pg. 790). Likewise, the debate mentioned makes clear that the "within their respective jurisdiction" phrase was intended specifically to refer to territorial jurisdiction.[12]

When the various statutes above discussed were consolidated and simplified in 1875 into the Revised Statutes,[13] the plan of Congress is apparent. The first sentence of the 1789 statute, the "all writs" portion, was put into R.S. 716, and the various portions of the habeas corpus statutes (the original as well as the amendments) were put into R.S. 751, 752 and 753.[14] Thus, the first portion of the 1789 act giving the *courts* power to issue writs of habeas corpus was placed in section 751. The second portion of the 1789 act giving the various federal *judges* the power to grant writs of habeas corpus for the purpose of an inquiry into cause

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[12]*Cf.* f.n. 11, *supra*. Mr. Trumbull then went on to say *(ibid)*: "but if the language is so broad that the Senator from Maryland thinks it may be susceptible of that construction, I shall have no objection to amending it by inserting after the word 'courts' in the fourth line of the first section the words 'within their respective jurisdictions;' so that it would then read, 'that the several courts of the United States and the several justices and judges of such courts, within their respective jurisdictions,' etc. If that will meet the views of the Senator from Maryland, I will move that amendment, or if he prefers, he can move an amendment in such form satisfactory to him as will accomplish the same object."

Whereupon, Mr. Johnson, the Senator from Maryland, replied: ". . . The amendment proposed by the honorable chairman is entirely satisfactory to me and removes that difficulty."

[13]There was actually no revision or change.

[14]While R.S. 716 still continued the language that the courts had power to issue writs of *scire facias*, reference to *habeas corpus* was omitted, obviously because that writ was covered by the other sections, 751-753. Reference to *scire facias* was eliminated from the section in the 1948 codification (28 USC 1651; 62 Stat. 944).

of commitment, was placed in section 752,[15] as was also the "within their respective jurisdictions" phrase of the 1867 Amendment placed therein. And, finally, the third portion of the 1789 Act, the *proviso*, restricting the power to issue writs of habeas corpus in cases of prisoners to the situation where it was necessary to bring him into court to testify or when in custody under United States authority, and the various extensions to the proviso effected by the 1833 (in custody for an act done pursuant to United States law), the 1842 (in custody by reason of foreign law or the law of nations) and the 1867 (in custody in violation of the Constitution, law or treaty of the United States) amendments, were placed in section 753.

The 1940 United States Code edition (28 USC [1940 ed.] §§ 451, 452 and 453, respectively) contained the same format as the Revised Statutes (§§ 751, 752 and 753, respectively).[16]

Finally, the 1948 codification put all three sections, including the 1911 and 1925 amendments (see f.n. 16, *supra*) into one section, the present 28 USC 2241. What was 28 USC (1940 ed.) 451 and 452 became subsection

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[15]The words "for the purpose of an inquiry into cause of commitment" were changed to "for the purpose of an inquiry into the cause of restraint of liberty." but we do not believe this to have been a substantive change. Also, the portion here in question in the 1789 Act referred only to the justices of the Supreme Court and the judges of the district courts, while R.S. 752 made clear that it also applied to circuit judges.

[16]A 1911 enactment (36 Stat. 1167) simply stated that the powers given to circuit courts were likewise given to district courts. And a 1925 amendment (43 Stat. 940) granted the right of appeal in habeas corpus matters and stated that a circuit judge had the same power to grant writs of habeas corpus within his circuit as a district judge had *within his district.*

(a) of 28 USC 2241 and what was 28 USC (1940 ed.) 453 became subsection (c).[17]

The result of all this is that in making the 1948 consolidation, Congress put back into one statute the district courts' power to issue writs of habeas corpus and returned to the same format which it had used in section 14 of the Judiciary Act of 1789 (1 Stat 81). And by the same token, the same kind of statutory interpretation which had been made by this Court of the first statute is applicable today. That is, section 2241 is an integrated statute, each part having to be read in the light of the other parts and each part being modified by the other parts.[18]

In *Ex parte Bollman*, 4 Cranch 75, at which time, as explained above, the statute (1 Stat. 81) gave the courts and judges general power to issue writs of habeas corpus, "for the purpose of an inquiry into cause of commitment," with the proviso that as to "prisoners in gaol" the writ could only issue where the prisoner was in custody by virtue of the authority of the United

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[17]Subdivision (b) which granted the Supreme Court and the justices thereof and the circuit judges the right to decline an application for writ of habeas corpus and to transfer the application to the district court having jurisdiction to hear it, was added for the orderly administration of justice so that such judges would not be in a position of disqualification or be burdened by applications which should go to the district courts (80th Cong., House Report No. 308). The 1948 amendment also added as a part of subsection (c)(5), the proviso regarding issuing the writ to bring a prisoner into court "for trial." The significance of this amendment in relation to its application to 28 USC 1651 will be discussed below.

[18]Likewise the various expansions during the years (1833, 1842, 1867) must be read as modifying and being modified by the basic power given by the Congress to the courts to issue writs of habeas corpus in the First Act.

States *or* where necessary to bring him into court to testify, this Court said (4 Cranch at 99):

> "This proviso extends to the whole section. It limits the powers previously granted to the courts, because it specifies a case in which it is particularly applicable to the use of the power by the courts—where the person is necessary to be brought into court to testify. . . ."

By the same token today: the "within their respective jurisdictions" proviso of subsection (a) of 2241 likewise "extends to the whole section." Since it is so clear that when Congress used the words "within their respective jurisdictions," it meant those words to mean "territorial," the whole of subsection (c), including the "for trial" provision is affected thereby. The argument of respondent that "the within their respective jurisdictions" applies to only *ad subjiciendum* is refuted by the legislative history reviewed, as well as by the ordinary meaning to be attributed to the words.

The insertion by Congress in 1867 of the "within their respective jurisdictions" language in the "inquiry into the cause of restraint of liberty" section is the same as though Congress had done so in the original "inquiry into cause of commitment" portion of the 1789 Act. In both, the power so given was modified by the proviso portions which followed; in the ensuing sentence in 1789; in the ensuing section in 1867 and in subsection (c) of 2241 in 1948.

It cannot be gainsaid, as respondent appears to attempt to do (pg. 19), that the district courts were *specifically given* extraterritorial power with respect to warrants of arrest (Rule 4[c][2], 9[c][1], Federal Rules of Criminal Procedure) *because* the law as laid

down in *Palmer v. Thompson*, 20 App. D. C. 273 (1902) and *Mitchell v. Dexter*, 244 Fed. 926 (CA 1 1917) was accepted as correct, the dictum in *Biddle v. Thiele*, 11 F. 2d 235 (CCA 8 1926) and *In re Christian*, 82 Fed. 885 (CA WD Ark. 1897) to the contrary notwithstanding, and that without such specific authorization the general rule would apply. (See notes of Advisory Committee on Rules, note to Rules 4(c)(2), 9.)[19] If Congress should see fit to except the process in the case at bar, that is one thing: but it has not done so, and unless it does, the general rule must apply.

Respondent's reliance (pg. 20) upon this Court's citation in *Albrecht v. United States*, 273 U.S. 1, 8, of *United States v. John Kelso Co.*, 86 Fed. 304 (ND Cal. 1898) and *United States v. Standard Oil Co. of Indiana*, 154 Fed. 728 (WD Tenn. 1907) is misplaced.

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[19]For example, the court in *Palmer v. Thompson*, 20 App. D.C. 273, 279-280, said:

> "We may assume that it would not be incompetent for Congress to enact that, *as occasion might require*, the writs of the Federal court of any Federal district of the Union might be executed in any other Federal district, and might be directed to the marshal of such other Federal district for execution. But *in the absence of specific statutory enactment* to that effect, it is undoubtedly the general rule of law that no court has authority or jurisdiction beyond the territorial limits of the district for which it has been established, notwithstanding that it may be, as in the present case, only one of numerous similar courts of the same sovereignty . . . [W]e do not find in the statute law the evidence that it has done anything of the kind. In our opinion neither section 1014 nor section 716 of the Revised Statutes purports to grant any such power. The provisions of section 1014 are certainly inconsistent with the theory of such a grant of power; and *there is no good ground to construe the power granted in section 716*, 'to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions and agreeable to the usages and principles of law,' *as intended to abolish the restrictions inherent in territorial limitation.*" (Italics added.)

No question of extraterritoriality was at all involved in *Albrecht*. The only question was whether a court could obtain jurisdiction over a defendant who, by making a general appearance and failing to move to quash the warrant of arrest, appeared without an arrest having been made. Said the court (273 U.S. 1, 8-9):

> ". . . That a defendant may be brought before the court by summons, without an arrest, is shown by the practice in prosecutions which are necessarily commenced by summons. Here the court has jurisdiction of the subject matter; and *the persons named as defendants were within its territorial jurisdiction*. . ." (italics added)

It was after the first sentence in the above quotation that this Court, in footnote 8, page 8 of 273 U.S., cited the *John Kelso* case and noted that that case was followed by the *Standard Oil* and other cases. It was for the proposition that summons is the proper way to obtain jurisdiction over a corporation in a criminal case, that *John Kelso* was cited, *not* for the proposition that the district court had extraterritorial jurisdiction to do so. There was no territorial jurisdiction problem in the *John Kelso* case at all. And it is to be noted that for the extraterritorial question the *Standard Oil* case relies (154 Fed. at 728) on the not followed dictum in the *In re Christian* case, 82 Fed. 885 (CC Ark. 1897).

As the notes of the Advisory Committee on Rules, referred to above, show, respondent is simply not correct when it states (pg. 21) that "The Federal Rules . . . embody and make explicit in certain defined situations the *pre-existing* view, . . . that in criminal cases district courts of the United States may, . . . issue

such process as is necessary to acquire jurisdiction of the defendant." (Italics added). To the extent that this is intended to mean that absent the specific exemption in the rules with regard to warrants, for example, the district courts have nation wide power, this is just not the law, as the *Mitchell v. Dexter, supra*, and *Palmer v. Thompson, supra*, cases followed by the change in the Rules show.

B.

There Is No Such Power Under 28 USC 1651.

Respondent's reliance (pg. 21, f.n. 8) on the fact that at common law the English practice had no problem of territorial limits with regard to writs of *habeas corpus ad prosequendum* as, for example, from England to Ireland, is misplaced. This is so not only because of the different jurisdictional set-up of the English courts, but also because the same was true of the writ of *habeas corpus ad subjiciendum*.[20] "Accordingly, the practice in the English common law courts is no argument that extraterritorial jurisdiction of the federal

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[20] 1 Chitty's Cr. L. (1847) pg. 119: "The habeas corpus ad subjiciendum . . . is deemed a prerogative writ which the king may send to any place, he having a right to be informed of the state and condition of every prisoner, and for what reason he is confined."

IV, Bacons Abridgment (1832) under the title: "Of the Habeas Corpus ad Subjiciendum.": "It hath already been observed, that the writ of *habeas corpus* is a prerogative writ and that therefore, by the common law, it lies to any part of the king's dominions; . . ." And the abridgment points out specifically that it runs to Ireland. See also, The Habeas Corpus Act 31 Car. 2, c. 4, § 11; and the Act of 56 Geo. 3, c. 100 §5. For the English law today, see II Halsbury's Laws of England, 3d Ed., pp. 29-31; and as to writs of habeas corpus other than *subjiciendum*, see pp. 51-52. For a longer discussion, see the Government's brief in *Johnson v. Eisentrager* (339 U.S. 763), pp. 33-49 under the topic: The Territorial reach of the Writ at Common Law; the English Habeas Corpus Acts; modern English decisions."

courts exists. *Ahrens v. Clark*, 335 U.S. 188 is irrefutable proof of that.

Indeed, a careful analysis of *Ahrens v. Clark*, demonstrates that all the members of this Court were in agreement that extraterritorial power does not exist under the facts in the case at bar, namely, where *both* the custodian *and* the prisoner are outside the territorial jurisdiction of the court. Thus, the dissent in *Ahrens* which felt that the district court had jurisdiction to issue the writ in that case, said (335 U.S. at 195, f.n. 3):

> "Congress has not given the District Court power to direct service of the writ to be made outside the limits of the state in which the court sits. . . ."

The dissent started (335 U.S. at 202) "from the accepted premise that . . . the jurisdiction of the district court is territorial" (citing *Georgia v. Pennsylvania R. Co.*, 324 U.S. 439, 467, 468) but went on to say that in that case there was (p. 203) "no problem of issuing process outside the District of Columbia . . . with which alone . . . the statutory phrase (within their respective jurisdictions) sought to deal." Accordingly, we submit, that even under the view of the dissent in *Ahrens*, where, as here, both the custodian and the prisoner are outside the jurisdiction of the district court, Congress having enacted no exception, the attempt to assert extraterritorial process must fail.

Adams v. McCann, 317 U.S. 269, cited and quoted from by respondent (pp. 22-23) does not assist in the case at bar. The fact that a court (in that case a circuit court of appeals) has power to issue a writ of habeas corpus in aid of its appellate jurisdiction does

not reach, nor help on, the question as to whether it has extraterritorial power to do so. In the *Adams* case there was no question of extraterritoriality. The prisoner was in the custody of the United States marshal right in the City of New York—well within the territorial limits of the court [Record on Appeal, pp. 1-4].

The same is true of *Price v. Johnston*, 334 U.S. 266, 279-283, relied upon by respondent (pp. 23-24). There, too, there was no territorial problem, the prisoner being in Alcatraz, within the jurisdiction and within a stone's throw of the 9th Circuit Court of Appeals. Contrary to respondent's reading of the *Price* case that it would support extraterritorial jurisdiction in the Courts of Appeal to issue writs of habeas corpus, the case specifically disavows any such speculation. Said this Court (334 U.S. at 284):

> "Formulation of the limitations of §262 which do exist must await the necessities of appellate jurisdiction in particular cases. . . ."

Moreover, *In re Boles*, 48 Fed. 75 (CCA 8 1891), which had such a question presented to it, decided against respondent's view. The court there said (48 F. at 76):

> ". . . [W]e cannot issue the writ in question to be served in another circuit, merely because the petitioner is there confined in execution of a sentence imposed by one of the district courts of the territory of Oklahoma . . ."

We have already discussed *United States v. Hayman*, 342 U.S. 205 (Open. Br. 11-14). What respondent fails to appreciate, we submit, is that 28 USC 2255 is a special statute which clearly indicates extraterritorial jurisdiction in the special situation there provided

for. The same cannot be said of the general statutes which give district courts jurisdiction over crimes committed within their respective jurisdictions—their districts. Such jurisdiction, having 6th Amendment Constitutional roots, is simply not sufficient to overcome the strength of the rule of territorial jurisdiction unless Congress makes a specific exception. We submit that it takes more than the mere fact that the court has jurisdiction over the case and the defendant to permit of the exercise of extraterritorial power. Something more is required of Congress before this can be permitted. *Cf. Ahrens v. Clark*, 335 U.S. 188 at 191.

In *United States ex rel. Knapp v. Lake Shore & Michigan Southern Railway Company*, 197 U.S. 536, the Interstate Commerce Commission had instituted an action in the circuit court for mandamus to compel an interstate carrier to make a report which the ICC had the right to require. The defendant contended that the court had no jurisdiction over an original action in mandamus. The Government replied to this by agreeing to that general proposition but arguing that under various sections of the Interstate Commerce Act the Commission is given the authority to inquire into the management of common carriers and to obtain from them complete information to enable it to perform its duties; that the Commmission is authorized to enforce the provisions of the Act; that the Commission may require the filing of reports and the fixing of the time thereof; that it is the duty of any district attorney of the United States to institute and prosecute all necessary proceedings for the enforcement of the Act; and hence, the power of the Commission to require the report being undoubted (p. 542), "the Commission has the power

to enforce obedience to the order." To which this Court replied (197 U.S. at 542-543):

> "But in what way? Manifestly only in such way as the courts have jurisdiction to give. . . . Such power cannot be inferred from the grant of authority to the Commission to enforce the act, or from the direction to district attorneys or the Attorney General to institute 'all necessary proceedings for the enforcement of the provisions' of the act . . ."

So here. The mere fact that the district court may have criminal jurisdiction over a matter is no basis for the inference that section 1651 grants extraterritorial power to issue a writ of habeas corpus, particularly in the light of the strong rule that for the existence of extraterritorial power there must be a specific Congressional exception.

The arguments of respondent (pp. 27-29) as to why there *ought* to be extraterritorial jurisdiction in this kind of a case are better addressed to Congress in support of an argument for the enactment of an exception. But for the purpose of this case they fail to show that the exception was created.

Needless to say, the cases with which respondent disagrees (f.n. 10, pp. 29-30) do, we submit, represent the correct law.[21]

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[21]Respondent seeks to minimize the force of the 7th circuit's decisions in *Edgerly v. Kennelly*, 215 F. 2d 420 (1954) and *Goldberg v. Hoffman*, 225 F. 2d 463 (1955) by suggesting that that circuit's later decision in *United States ex rel. Moses v. Kipp*, 232 F. 2d 147 (1956) modified that court's earlier views as to the nonexistence of extraterritorial power to issue the writ here in question. Such a conclusion is not permissible. Not only was the question of jurisdiction to issue the writ extraterritorially not raised

(1) *Congress Has Made Clear That the Courts Have No Power to Issue the Writ of Habeas Ad Prosequendum Under 28 USC 1651.*

As seen, respondent makes an extensive argument (pp. 22-29) to the effect that under 28 USC 1651 the district courts have, or should have, the power to issue writs of *habeas corpus ad prosequendum* ancillary to or in aid of their general criminal jurisdiction. We have shown, we believe, that 1651 cannot be said to confer extraterritorial power.

But whatever may have been the correct interpretation prior to 1948, we believe that since that time there is no power permitted to the federal courts to issue writs of *habeas corpus ad prosequendum* under section 1651. This is so for the following reasons: Prior to 1948 the habeas corpus statute, as such, as distinguished from the "all writs" statute, contained no reference to, nor any language which could be interpreted as meaning, the writ of *habeas corpus ad prosequendum*. Section 14 of the Judiciary Act of 1789 (1 Stat. 81)

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in the *Moses* case nor were the two cases mentioned, cited, but in the still later case of *United States ex rel. State of Wisconsin v. First Federal Savings and Loan Association*, 248 F. 2d 804 (1957), the court took pains to say (pg. 808):

"The general jurisdiction of federal district courts is limited and defined strictly by statute. We cannot look beyond Congressional enactments to determine the extent or scope of this jurisdiction . . .

"This provision [1651(a)] does not enlarge or expand the jurisdiction of the courts but merely confers auxiliary jurisdiction where jurisdiction is otherwise granted and already lodged in the court . . . In passing upon the meaning and purpose of this section this court has said:

'(w)hile the section augments the power of the court in cases of existing jurisdiction, it in no wise expands or extends its territorial jurisdiction.'

Edgerly v. Kennelly, 7 Cir., 1954, 215 F. 2d 420, 422."

gave courts power to issue the writ of *habeas corpus ad testificandum* by its "necessary to be brought into court to testify" language, but said nothing about a prisoner being brought into court "for trial." So stood the statutes until the 1948 codification. None of the amendments, revisions or codifications (1833, 1842, 1867, 1875, 1911, 1925, 1940) said anything about power to bring a prisoner into court "for trial." Accordingly, it is arguable that the "all writs" portion of the 1789 statute and its successors (R.S. 716, Jud. Code 262, 28 USC [1940 ed.] 377) could have been looked to as the source of power for the courts to issue the *ad prosequendum* writ.[22]

However, in 1948 Congress specifically put the power to issue the writ of *habeas corpus ad prosequendum* into the habeas corpus statute. Hence, in subsection (c)(5) of 28 USC 2241 for the first time, is set out the power to issue the writ of habeas corpus "to a prisoner . . . to bring him into Court . . . for trial." When Congress did this it took out of the "all writs" statute the power to issue *ad prosequendum*, and whatever power the federal courts have with relation thereto is now in the *habeas corpus* statute itself. This is the only conclusion which can be drawn, both from the fact itself and from the cases.

In *Ex parte Dorr*, 3 How. 103, 11 L.ed. 514, the prisoner had been sentenced for life by the Rhode Island state court for treason. The state officials would not permit his lawyer to see him to ascertain if he wanted to take his case to the United States Supreme

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[22]We are not here speaking of the extraterritoriality problem; just the question of the power to issue the writ.

Court by writ of error. Treadwell, the attorney, sought a writ of habeas corpus from this Court to bring Dorr up to ascertain whether he wanted to petition the Court. This Court, after quoting from Section 14 of the Judiciary Act of 1789, including the "all writs" portion thereof ruled that (11 L.ed. at 515):

> "The power given to the courts by this section . . . as regards the writ of *habeas corpus* is restricted by the proviso to cases where a prisoner 'is in custody under or by color of the authority of the United States, or has been committed for trial before some court of the same, or is necessary to be brought into court to testify.' This is so clear, from the language of the section that any illustration of it would seem to be unnecessary. The words of the proviso are unambiguous. They admit of but one construction. And that they qualify and restrict the preceding provisions of the section is indisputable."

Accordingly, this Court had no power to issue the writ even under such extreme circumstances, notwithstanding the presence of the "all writs" statute. Accord: *Taylor v. Carryl*, 20 How. 583; *Ex parte Cabrera*, 1 Washington Reports 232 (CC 3 1805).

So today under section 2241. To the extent, if at all, that section 1651 gives the power to issue the writ of *habeas corpus*,[23] such power is modified and restricted by 2241. Section 2241 is today a limitation upon section 1651 just as much as was the habeas corpus por-

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[23]And not even *United States v. Hayman*, 342 U.S. 305 suggested that such power was given in 1651. Indeed it took pains to point out (pg. 220): "This is not a habeas corpus proceeding."

tion of Section 14 of the 1789 Judiciary Act a limitation upon the "all writs" portion of that section. And just as in 1789, the court's power today to issue writs of habeas corpus is governed by the section which deals specifically with that writ. Since Congress, in 1948, put into section 2241 provisions for the courts to issue writs of habeas corpus to bring a prisoner "into court for trial" (the writ of *habeas corpus ad prosequendum*), power so to do is governed by 2241; section 1651 has no longer anything to do with it.

This is simply the application of the doctrine that the special controls the general.

The same theory was applied in *In re Boles*, 48 Fed. 75 (CCA 8 1891) where the circuit court of appeals held that it had no power to issue a writ of habeas corpus to a prisoner outside its circuit even though the attack be on a conviction by a court within the circuit. Thus, then, when Congress makes specific provision for a particular writ—here, *habeas corpus ad prosequendum* —the court's power with relation thereto is controlled by the specific provisions of 28 USC 2241 and not by 28 USC 1651, the general "all writs" provision.

Accordingly, section 1651 is inapplicable today as a source of power for the district courts to issue writs of *habeas corpus ad prosequendum*. And, since, as we have shown above under Point II, A, the "within their respective jurisdictions" clause of 2241 is a territorial limitation, the district court here had no power to issue the writ for execution outside its district.

C.

The Territorial Limitation on Habeas Corpus Is Largely the Result of the Government's Argument to This Court in Other Cases.

We believe it only fair to point out that the position taken, and the argument made to this Court, by the Government has been a large and important factor in the establishment of the rule of territorial limitation upon the power of the district courts to issue writs of habeas corpus. In cases before this Court involving the Great Writ where there appeared to be ever so much reason for not limiting the writ territorially, the Government argued to the contrary. Thus, in *Hirota v. MacArthur*, 338 U.S. 197 (1948), the Government urged upon this Court (Brief in Opposition to Motion for Leave to File Petition for Writ of Habeas Corpus, pg. 34):

> "... [T]he structure of our habeas corpus statute, its legislative history, and historical background, support the conclusion that detention within the territorial jurisdiction of a district court is a necessary condition to the issuance of a writ of habeas corpus. *If changes are to be made, Congress must make them.*" (Italics added)[24].

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[24]Previous thereto, in *Ahrens v. Clark*, 335 U.S. 188, the Government had persuaded the two lower courts that the district court's power was limited territorially. In their brief in this Court, the Government said (p. 10, f.n. 7): "In the courts below the Government contended that the district court had no jurisdiction because the proceedings were not brought in the district in which the petitioners were detained." And even though in *Ahrens* the Government was willing to waive the point, it still maintained its territorial position. Thus it told this Court (Br. p. 14): "Accordingly we submit that, aside from the Government's present willingness to waive the objection *for the purposes of this case only*, there is no basis for reversing the courts below with respect to this jurisdiction ground for decision." (Italics added)

We do not believe that the Government can, as in the well-known story about Abraham Lincoln when acting as attorney for two different clients, take one position in the morning case and the opposite position in the afternoon case and contend that "This afternoon, your honor, I am right." The Government, when it has induced this Court by argument to set down a principle of law that is clear and concise, should not be permitted to change its position simply to suit its convenience at the time. (*Cf. Berger v. United States*, 295 U.S. 78, 88; *United States v. Atlantic Refining Co.*, 360 U.S. 19, 23-24; and see *Jones v. United States*, 362 U.S. 257, 263: "to hold to the contrary . . . would be to permit the Government to have the advantage of contradictory positions . . .")

Probably the best argument for the territorial limitation of the habeas corpus statute and for adherence to the rule that if changes are to be made, Congress and not the courts should make them, was made in the Government's brief before this Court in *Johnson v. Eisentrager*, 339 U.S. 763. That case, and the Government's argument therein, are especially important and weighty because of the strong moral position of the prisoners there who had been convicted by United States officials, were then incarcerated by United States officials and where there was no other forum to which they could go to challenge the legality of their imprisonment.[25]

We take the liberty of quoting at length from the Government's brief:

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[25] *Cf. Parker v. Ellis*, 362 U.S. 574, especially in light of the dissent therein.

Pg. 15

"ARGUMENT

"I

"A Federal District Court Is Without Jurisdiction to Issue a Writ of Habeas Corpus Where the Prisoner-Applicant Is Confined Beyond the Territorial Jurisdiction of the Court, Regardless of Whether He Is or Is Not Confined Within the Territorial Limits of Some Federal Court Having Jurisdiction to Issue the Writ

Page 17

"A. *The Ahrens decision*

". . . [T]he decision (in Ahrens) was that the presence of the petitioners within the territorial confines of the district court was an essential prerequisite attached by Congress to the court's power to act at all. . ."

Pg. 19

"If, in other words, a court lacks *power to act* because the applicant for relief is without its territorial confines, the fact that no other court happens to have power to act is, perforce, an irrelevant consideration. . . . For, as stated in *McGowan v. Moody*, 22 App. C.D. 148, 158, which is cited with apparent approval in the *Ahrens* opinion (335 U.S. at 190):

The question is one of power, and not of the expediency of its exercise in the particular case, because there may happen to be no other tribunal in which relief may be had.

Pg. 20

". . . The holding in that case (Ahrens) was that where there is no detention within the dis-

trict, there is by congressional mandate a total absence of power to issue the writ—not merely that the fact of detention outside the district justifies or requires the non-assertion of admitted power in the interest of orderly administration. And, that being so, as we have said, both reason and authority dictate that the result cannot be otherwise merely by virtue of the extrinsic [pg. 21] consideration that the place of detention happens not to be within the territorial limits of any federal court.

"B. *The Federal statutes and the District of Columbia Code.*—It seems clear from a reading of the habeas corpus provisions of the general federal statutes as a whole (28 USC [1948 rev.] 2241-2255 that Congress never contemplated that a federal court or judge should have power to issue a writ of habeas corpus where the prisoner-applicant for the writ was not confined within the territorial jurisdiction of such court or judge. The *Ahrens* opinion mentions some of the legislative indicia of this congressional intent (see 335 U.S. at 189-191), especially the limiting words 'within their respective jurisdictions' in §2241 (formerly 28 U.S.C. [1946 ed] 452). Further evidence is to be found in the fourth paragraph of §2242 providing that—

> If addressed to the Supreme Court, a justice thereof or a circuit judge [*i.e.* the application for the writ] shall state the reasons for not making application to the district court of *the district in which the applicant is held.* [Italics added.]

And the second sentence of § 2241 (a) (see pp. 2-3, *supra*) states that—

The order of a circuit judge [granting a writ of habeas corpus] shall be entered in the records of [pg. 22] *the district court of the district wherein the restraint complained of is had.* [Italics added.]"

Pg. 24

"C. *State and territorial legislation.*

". . . While it is recognized, of course, that the provisions of these statutes have no authoritative bearing on the question of the reach of the writ under federal law, it is not without significance, we think, that in every instance, either in explicit terms or by clear implication, jurisdiction to issue the writ is limited by these statutes to cases where the detained petitioner is confined within the territorial limits of the state or territory, or even within narrower limits (the county, district, etc.) where the jurisdiction of the court or judge issuing the writ has narrower territorial jurisdiction. This universal conception of the writ as being thus jurisdictionally limited to the territory where the detained person is confined is persuasive evidence that this limitation inheres in the very nature of the historic writ, and that there was no intention on the part of Congress, when it enacted the habeas corpus statute, to make the writ perform a broader function."

Pg. 30

". . . We recognize the force of these considerations (that the states have seldom, if ever, been confronted with the jurisdictional problem in this case), but we believe, nevertheless, that the univer-

sality of the states' conception of the writ as inherently containing the jurisdictional limitation for which we contend demonstrates that this limitation was embodied in the writ as inherited from the common law. In these circumstances, it would require very clear and persuasive evidence to show that Congress, in enacting the federal habeas corpus statutes, intended to eliminate the limitation in question and thereby make the writ perform a broader function.

"It may be that it would be the part of wisdom and consonant with present-day conceptions to expand the traditional scope of the writ so as to make it serve to test, in American civil courts, the legality of detention occurring anywhere in the world, provided the detention is by authority of the United States, or its military or civilian officers. We submit, however, that if the traditional scope of, and jurisdictional limitations upon, the writ are thus to be expanded, it should be done, not by judicial construction, but by Congressional enlargement of the writ in the light of modern conditions."

Thus spoke the Government to this Court when it desired territorial limitation.

The district court's power to issue writs of habeas corpus to bring a prisoner "into court for trial" is embodied within "the whole scheme of the habeas corpus statute."[26] The Government's argument quoted above

[26]This language is from the Government's petition for writ of certiorai in *Johnson v. Eisentrager*, p. 7, f.n. 3: "the whole scheme of the habeas corpus statute is based on the assumption that there must be custody within the territorial jurisdiction."

applies to petitioner in this case to a "T". This court should not change the law depending upon whether it is the citizen or the Government who is making the territorial argument. As the Government so effectively urged upon this court in the *Johnson* case: if the traditional territorial jurisdictional limitation upon the writ of habeas corpus is to be expanded, it should be done, not by judicial construction, but by congressional enlargement.

III.

Petitioner Has Standing to Challenge the Authority of the District Court to Issue the Writ in Question (Reply to Respondent's Point III, pp. 30-33).

Initially, we submit, the matter is not before, and should not be considered by, this Court. The point was not passed upon by the court below, the case having been submitted on the merits [R. 25].[27] Accordingly, respondent not having filed a cross-petition for writ of certiorari, the question should not be passed upon herein (*United States v. Storer Broadcasting Co.*, 351 U.S. 192, 200). The general rule is that a point not pressed nor passed upon by the court below will not be reviewed here (*Duignan v. United States*, 274 U.S. 195, 200; *Blair v. Oesterlein Machine Co.*, 275 U.S. 220, 225). We submit that that rule and not an exception should be applied in the case at bar.

In any event, petitioner does have standing to raise the issue. The cases relied upon by the Government

[27]It is true that respondent raised the point before the lower court in its motion to dismiss the appeal [R. 32]. However, upon oral argument it was stipulated that the appeal itself be submitted to the court on the merits [R. 25], this was done and the court ruled on the merits *(ibid)*.

(pg. 31) are inapposite. In none of them was the fundamental question of the *jurisdiction* of the court to act extraterritorially involved. Petitioner is not here claiming immunity from a second prosecution (*Ponzi v. Fessenden,* 258 U.S. 254), nor is he claiming that a court before which he *was* brought for trial did not have the right to try him (*United States ex rel. Buchalter v. Warden of Sing Sing Prison,* 141 F. 2d 259 (CA 2 1944); *U.S. ex rel. Spellman v. Murphy,* 217 F. 2d 247 (CA 7 1954); *Rawls v. United States,* 166 F. 2d 532 (CA 10 1948).[28]

Petitioner is claiming that the order which affects him so directly was made without jurisdiction of the court. Since parties cannot waive lack of jurisdiction (*Ahrens v. Clark,* 335 U.S. 188, 193), it would seem clear that a person so vitally affected by the order has standing to call to the attention of the court the lack of jurisdiction.

Since "it is the duty of every court of its own motion to inquire into the matter (of jurisdiction) irrespective of the wishes of the parties, and be careful that it exercises no powers save those conferred by law," (*Minnesota v. Hitchcock,* 185 U.S. 373, 382; accord: *Cutler v. Rae,* 7 How. 729, 731), respondent cannot avoid inquiry into the issue on a theory that petitioner has no right to raise it.

In *Joint Anti-Fascist Refugee Committee v. McGrath,* 341 U.S. 123, this Court held that organizations listed by the Attorney General in connection with the Government's *internal* personnel problem and where no action was being taken against the organizations nor any-

[28] *Cf. Frisbie v. Collins,* 342 U.S. 519.

thing required of them, had standing to test the validity of the Attorney General's action. Answering the standing to sue argument, Mr. Justice Frankfurter, in his concurring opinion, pointedly said (341 U.S. at 157):

> ". . . The objection to judicial restraint of an unauthorized exercise of powers is not weighty."

Moreover, the question involved in this case is a procedural matter of substantial importance. In the exercise of this Court's supervisory authority over the administration of criminal justice in the federal courts (*McNabb v. United States,* 318 U.S. 332, 341) this Court has an obligation to the litigants and the bar, we respectfully submit, to settle the matter in issue. If it be a fact, as we contend, that the district court acted without jurisdiction, it is an unthinkable administration of justice that the practice be permitted to continue. Since the present type of procedure is the only one in which the question can be raised and decided,[29] this Court should decide it (*cf. Barrows v. Jackson,* 346 U.S. 249, 254-260; *Truax v. Raich,* 239 U.S. 33, 38).

If, however, petitioner be mistaken in his view of this matter, then, we respectfully suggest, the proper procedure would be to remand the case to the court below

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[29]By virtue of the principle established in *Ponzi v. Fessenden,* 258 U.S. 254 and effectuated in another form in *Frisbie v. Collins,* 342 U.S. 519. It is one thing to say that *after* a person has been brought before the court, he has no standing to challenge the means by which he was brought there. It is quite another thing to say that *before* the asportation, he has no standing to endeavor to prevent the happening of an illegal act—one which is in excess of the jurisdiction of the court. (*Cf. Hearst v. Black,* 87 F. 2d 68, 71 [CA DC 1936]).

for consideration by, and argument before, that court. Indeed, respondent not having raised in the district court the question of petitioner's right to challenge the writ [R. 14], it would appear that it is that court to which the question should first be presented in the event of a remand.

Conclusion.

The judgment of the court below should be reversed and the writ of *habeas corpus ad prosequendum* ordered quashed.

Respectfully submitted,

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APPENDIX A.

Abstract of Provisions of 28 U. S. C. 1651 and Legislative Antecedents Thereto.

28 U. S. C. 1651 (1948)

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.

28 U. S. C. (1940) 342

Supreme Court power to issue prohibition and mandamus to district courts and any courts appointed under authority of United States.

Jud. Code 234 (1911)
same

R. S. 688 (1875)
same

1 Stat. 80 (1789)

Original and appellate jurisdiction of Supreme Court.

Power to issue prohibition and mandamus to district courts and courts appointed or persons holding office under authority of United States.

28 U. S. C. (1940) 376

Justice of Supreme Court and judge of district court given power to issue writs of ne exeat.

Jud. Code 261 (1911)
same

R. S. 717 (1875)

Same, except that in place of "district judge" the words are "circuit justice or circuit judge" and in place of "district court" the words are "circuit court."

16 Stat. 44 (1869)

Provision for appointment of circuit judges and how circuit courts shall be held.

1 Stat. 334 (1793)

Judge of Supreme Court given power to grant writs of ne exeat and injunction in cases where may be granted by supreme or circuit court.

28 U. S. C. (1940) 377

Supreme Court and district courts power to issue writs of scire facias.

S. Ct., C. C. A. and Dist. Ct. power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions and agreeably to the usages and principles of law.

Jud. Code 262 (1911)
same

R. S. 716 (1875)

Same except courts listed were "Supreme Court, circuit and district court."

1 Stat. 334 (1793)

Judge of Supreme Court given power to grant writs of ne exeat and injunction in cases where may be granted by supreme or circuit court.

1 Stat. 81 (1789)

All the before mentioned courts of U. S. shall have power to issue * * * all other writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law.

Abstract of Provisions of 28 U. S. C. 2241 and Legislative Antecedents Thereto.

28 U. S. C. 2241 (1948)

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

(b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.

(c) The writ of habeas corpus shall not extend to a prisoner unless—

(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or

(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or

(4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or

(5) It is necessary to bring him into court to testify or for trial.

28 U. S. C. (1940) 451

Supreme Court and District Courts shall have power to issue writs of habeas corpus.

28 U. S. C. (1940) 452

Justices of Supreme Court, judges of CCA and of district courts, *within their respective jurisdictions* shall have power to grant writs of habeas corpus. Circuit court given same power to issue writs of habeas corpus *within his circuit* as district judge within his district.

28 U. S. C. (1940) 453

The writ of habeas corpus shall in no case extend to a prisoner in jail unless where

1. same as 2241
2. same, except "pursuance of a law of the United States" instead of "Act of Congress"
3. same except "law" and "treaty" instead of "laws" and "treaties"
4. same except "except whereof" instead of "effect of which"
5. same except "prisoner" instead of "him" and "or for trial" does not appear.

43 Stat 940 (1925)

Provides for appeal to CCA in habeas corpus proceeding.

Circuit judge same power to grant habeas corpus within his circuit as district judge has within his district.

36 Stat. 1167 (1911)

Any power or duty conferred upon circuit court, is conferred upon the district courts.

R. S. 751 (1875)

Supreme Court and circuit and district courts shall have power to issue writs of habeas corpus.

R. S. 752 (1875)

Several justices and judges of said courts, *within their respective jurisdictions*, shall have power to grant writs of habeas corpus for the purpose of an inquiry into the restraint of liberty.

R. S. 753 (1875)

Same as 453 above

16 Stat. 44 (1869)

Provision for appointment of circuit judges and how circuit courts shall be held.

14 Stat. 385 (1867)

Courts of United States and justices and judges, *within their respective jurisdictions* power to grant habeas corpus.

(1) in all cases where persons may be restrained of liberty in violation of constitution or of any treaty or law of the United States.

Provides for complete procedure on habeas corpus in lower court and on appeal to circuit court and Supreme Court.

5 Stat. 539 (1842)

Supreme Court justices or judge of any district court *in which a prisoner is confined*, power to grant habeas corpus.

(1) where person, subject or citizen of foreign state is confined under any authority or law of the United States.

Provides for procedure for appeal to circuit courts and Supreme Court.

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All before-mentioned courts of United States shall have power to issue writs of *scire facias*, habeas corpus * * *.

Supreme Court justice and judges of district courts shall have power to grant writs of habeas corpus

1. For the purpose of an inquiry into cause of commitment

Provided habeas corpus shall not extend to prisoners in jail unless

(1) Where in custody under authority of United States or committed for trial before some court of same, or

(2) Or are necessary to be brought into court to testify.

16 Stat. 44 (1869)

Provision for appointment of circuit judges and how circuit courts shall be held.

14 Stat. 385 (1867)

Courts of United States and justices and judges, *within their respective jurisdictions* power to grant habeas corpus.

(1) in all cases where persons may be restrained of liberty in violation of constitution or of any treaty or law of the United States.

Provides for complete procedure on habeas corpus in lower court and on appeal to circuit court and Supreme Court.

5 Stat. 539 (1842)

Supreme Court justices or judge of any district court *in which a prisoner is confined*, power to grant habeas corpus.

(1) where person, subject or citizen of foreign state is confined under any authority or law of the United States.

Provides for procedure for appeal to circuit courts and Supreme Court.

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SUPREME COURT OF THE UNITED STATES

No. 72.—October Term, 1960.

Paul John Carbo, Petitioner, v. United States.	On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[January 9, 1961.]

Mr. Justice Clark delivered the opinion of the Court.

The sole question in this case is whether the United States District Court for the Southern District of California has jurisdiction to issue a writ of *habeas corpus ad prosequendum* directing a New York City prison official to deliver petitioner, a prisoner of that city, to California for trial on an indictment pending in the California court.[1] Both the District Court and the Court of Appeals have held that such jurisdiction does exist. 277 F. 2d 433. Recognizing that the effective administration of criminal justice required our decision on the point, we granted certiorari. 363 U. S. 802. We affirm the judgment.

Petitioner, one of five defendants indicted on September 22, 1959, in the District Court for the Southern District of California on charges of extortion and conspiracy,[2] was arrested in Baltimore, Maryland, where he posted bond returnable to the California court. Before appearing in California pursuant to his obligation under the bond, petitioner pleaded guilty to three misdemeanor charges in

[1] The Government has raised the question of petitioner's standing to challenge the writ (cf. *Ponzi* v. *Fessenden*, 258 U. S. 254), which point it waived by stipulation in the Court of Appeals. In light of the circumstances under which the case reaches us we do not believe that the point is well taken.

[2] 18 U. S. C. §§ 875, 1951.

New York City and was sentenced to serve a two-year term in the New York City Prison, in addition to payment of a fine. Pursuant to a writ of *habeas corpus ad prosequendum* issuing from the California court to the New York City prison authorities, the petitioner appeared in custody before that court, was arraigned and pleaded not guilty to the indictment. Upon petitioner's request the court ordered that he be returned to the New York City Prison in custody in order to obtain counsel and that he thereafter be returned [3] to California in time for trial on the indictment set for March 29, 1960. In order that petitioner might meet the obligation of his bond, as well as that of the latter order, the court, on March 16, 1960, again issued a writ of *habeas corpus ad prosequendum* to the New York City prison official directing the return of the petitioner for trial on March 29, 1960. On the same date and before it could be served, the petitioner moved to quash the writ. His sole ground of objection was that the United States District Court for the Southern District of California had no power to issue the writ to an officer located outside of its territorial limits. The contention is bottomed on the language of 28 U. S. C. § 2241 as codified in 1948.[4] We have concluded that the issuance of the

[3] The order was as follows:

"Defendant appears without counsel and requests permission to enter his plea and be permitted to return to New York and obtain counsel there and return here for trial.

"Defendant Carbo pleads not guilty. . . .

"Court Orders cause as to Defendant Carbo set for trial with co-defendants on March 29, 1960, 9:30 A. M., and directs that Defendant Carbo be returned to New York for the purpose of obtaining counsel and be returned here in time for trial."

[4] 28 U. S. C. § 2241 provides:

"(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be

writ of *habeas corpus ad prosequendum* was within the jurisdiction of the court as authorized by the Congress in § 2241.

This is the first time this Court has undertaken a construction of the statutory authority for the issuance of writs of *habeas corpus ad prosequendum* since Chief Justice Marshall, in *Ex parte Bollman*, 4 Cranch 75 (1807), interpreted the language of the First Judiciary Act, 1 Stat. 81–82 (1789). It seems, therefore, both appropriate and in our view necessary, to first trace the course followed by congressional action granting judicial power to issue writs of *habeas corpus* generally.

Section 14 of the First Judiciary Act gave authority to

> "all the . . . courts of the United States . . . to issue writs of *scire facias, habeas corpus,* and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law. And . . . either of the justices of the supreme court, as well as judges of the district courts, shall have power to grant writs of *habeas corpus* for the purpose of an inquiry into the

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entered in the records of the district court of the district wherein the restraint complained of is had.

"(c) The writ of habeas corpus shall not extend to a prisoner unless—

"(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or

"(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

"(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or

"(4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right . . . ; or

"(5) It is necessary to bring him into court to testify or for trial."

cause of commitment.—*Provided*, that writs of *habeas corpus* shall in no case extend to prisoners in gaol, unless where they are in custody, under or by colour of the authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into court to testify." 1 Stat. 81–82 (1789).

We are indeed fortunate to have the benefit of the close scrutiny to which Chief Justice John Marshall subjected § 14 in *Ex parte Bollman, supra*. Initially, the Chief Justice observed that "for the meaning of the term *habeas corpus*, resort may unquestionably be had to the common law; but the power to award the writ by any of the courts of the United States, must be given by written law." 4 Cranch, at 93–94. Mindful perhaps of his own observation the preceding year that "There is some obscurity in the act of Congress," *Ex parte Burford*, 3 Cranch 448, at 449, he then proceeded to analyze the meaning of the writ as described in § 14. He recognized that the term *habeas corpus* "is a generic term" including many species of that writ. It encompassed, he concluded, in addition to the Great Writ (*habeas corpus ad subjiciendum*, for an inquiry into the cause of restraint) the writ *habeas corpus ad prosequendum*. The "Great Chief Justice" noted, however, that when used in the Constitution,[5] that is, "when used singly—when we say *the writ of habeas corpus*, without addition, we most generally mean that great writ" traditionally used to test restraint of libery. *Ex parte Bollman, supra*, at p. 95.

The Chief Justice, following the English practice, particularly 3 Blackstone, Commentaries* 129, noted that the writ *ad prosequendum* was necessary to remove a prisoner in order to prosecute him in the *proper jurisdiction* wherein the offense was committed. In his discussion of the common usage of the various writs he recognized in *Ex*

[5] Art. I, § 9, cl. 2.

parte Bollman, *supra*, that the Congress had without qualification authorized the customary issuance of the writ *ad prosequendum* by a jurisdiction not the same as that wherein the prisoner was confined.

Following the Judiciary Act of 1789, there came a series of legislative amendments dealing with habeas corpus, but significantly, all related solely to the usages of the Great Writ.[6] Simultaneously with the expansion of the Great Writ, there developed from the common source, § 14 of the first Judiciary Act, a second line of statutes—the "All writs" portion of § 14, in large measure the first sentence of that section, devolved by a process of addition along a course parallel to but separate from the habeas corpus provisions. Upon revision of the federal statutes in 1875, the general power of courts to issue writs of habeas corpus, which was a part of the express grant in the first sentence of § 14, disappeared from the language of the statutes derivative from the all writs portion of the first sentence, R. S. § 716 (1875), which, after further amendment, is known today as 28 U. S. C. § 1651.[7] This general power, was, however, retained in the first of the three reorganized sections of the Revised Code dealing with habeas corpus, R. S. § 751 (1875),[8] and served as the modern version of the authority for writs *ad prosequendum* upon which Marshall had relied in *Ex parte Bollman*.

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[6] The habeas corpus provisions of § 14 of the original Judiciary Act, 1 Stat. 81 (1789) were amended by 4 Stat. 634 (1833), 5 Stat. 539 (1842), 14 Stat. 385 (1867), R. S. §§ 752–753 (1875), and 43 Stat. 940 (1925).

[7] R. S. § 716 (1875): "The Supreme Court and the circuit and district courts shall have power to issue writs of scire facias. They shall also have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law."

[8] R. S. § 751 (1875): "The Supreme Court and the circuit and district courts shall have power to issue writs of habeas corpus."

The second section in the 1875 Revision of the laws on habeas corpus, R. S. § 752, authorizing issuance of the Great Writ by justices and judges, included the jurisdictional limitation [9] which had been imposed for the first time [10] in 1867, 14 Stat. 385. The motive for that limitation can be traced to the position reportedly taken by Chief Justice Chase in rejecting an application for the Great Writ from a prisoner on the ground that he was incarcerated outside his circuit. Mindful of the position taken by the Chief Justice, the Senate amended the first draft of the bill expanding once again the usage of the Great Writ and inserted the phrase "within their respective jurisdictions"—an obvious limitation upon the action of individual judges and justices in exercising their power to issue the Great Writ.[11] The debates in Congress indicate that it was thought inconvenient, potentially embarrassing, certainly expensive and on the whole quite unnecessary to provide every judge anywhere with authority to issue the Great Writ on behalf of applicants far distantly removed from the courts whereon they sat.[12]

The third section in the revised arrangement, R. S. § 753, collected all the instances in which the Great Writ might issue on behalf of imprisoned applicants.

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[9] R. S. § 752 (1875): "The several justices and judges of the said courts, within their respective jurisdictions, shall have power to grant writs of habeas corpus for the purpose of an inquiry into the cause of restraint of liberty."

[10] Actually, the 1842 extension of the Great Writ's availability to imprisoned applicants, 5 Stat. 830, had imposed a jurisdictional limitation upon its issuance—power to grant applications by foreign citizens was given only to Justices of the Supreme Court, and to judges of the District Court *in the district of confinement*.

[11] This decision, unreported, would appear consonant with a legitimate inference drawn from the jurisdictional limitation expressed in 1842, cf. note 10, *supra*, that Justices of the Supreme Court should limit their considerations to applications from within their assigned circuits, just as district judges were limited to their district.

[12] Cong. Globe, Part 1, p. 730; Part 2, pp. 790, 899, 39th Cong., 2d Sess.

From this history it becomes obvious that the Congress had continual concern for the Great Writ—*habeas corpus ad subjiciendum*. Exclusively to it did it give attention, and only upon its issuance did it impose a limitation. The other species of the writ, including that involved here—*habeas corpus ad prosequendum*—continued to derive authority for their issuance from what had been the first sentence of § 14 of the First Judiciary Act, which was not repealed until the 1875 Revision of the Statutes at Large, when it was re-enacted as two separate and distinct sections, R. S. § 716 (all-writs) and R. S. § 751 (general habeas corpus).

The Congress had obviously made an attempt to completely separate the habeas corpus provisions from those concerning other writs. However, just as in 1789 Marshall had found authority for the writ *ad prosequendum* in the reference to habeas corpus in the first sentence of § 14, so too in 1875 its authority was constituted in the lineal derivative of that sentence, R. S. § 751, which gave courts without jurisdictional limitation, as distinguished from individual judges, R. S. § 752, the power to issue writs of habeas corpus generally. *State* v. *Sullivan*, 50 F. 593, 598. Clearly, the use of the phrase in § 751 was generic, whereas the grant of authority to judges "within their respective jurisdictions" in R. S. § 752 was specific, meaning only the Great Writ.[13]

Thus, the *ad prosequendum* writ, necessary as a tool for jurisdictional potency as well as administrative efficiency, extended to the entire country. The Great Writ, however, designed to relieve an individual from oppressive confinement, could well have been and properly was, at least as early as 1842,[14] issuable only in the district of confinement. This was in consonance with convenience,

[13] We do not decide whether the writ *habeas corpus ad testificandum* was intended by Congress to be subject to the 1867 jurisdictional limitation. Cf. *Edgerly* v. *Kennelly*, 215 F. 2d 420.

[14] See note 10, *supra*.

necessity and avoidance of inordinate expense—considerations remarkably unpersuasive when viewed in light of the role of the writ *ad prosequendum*.

This same trichotomy of sections in the revised statutes, setting out the statutory authority for habeas corpus, was continued through the 1911 revision of the Judicial Code which did not affect by repeal or significant amendment the existing law on the writs.[15] In 1925, when the Judicial Code was amended, 43 Stat. 940, some attention was again paid to habeas corpus, but only to assign to individual judges of the Courts of Appeals the same power within their circuits as District Court judges had within their districts—an obvious adherence to the tradition embodied in R. S. § 752 which dealt only with the Great Writ and imposed the jurisdictional limitations on its issuance. In 1948, when further clarification of the United States Code [16] was thought desirable, the statute took its present form, and for the first time in the legislative history of the writ of habeas corpus there was made explicit reference to the writ *ad prosequendum* in a statute.[17] Although the three sections were merged into one, it was done only "with changes in phraseology necessary to effect the consolidation." Specifically disclaimed was any intent to change the existing law on habeas corpus. That the Revisor considered the new section to deal almost exclusively with the Great Writ, in spite of its authorization of writs *ad testificandum* and *ad prosequendum*, is obvious from his own note: "Words 'for the purpose of an inquiry into the cause of restraint of liberty' . . . were omitted as merely descriptive of the writ." [18] However, as reconstructed in § 2241, the au-

[15] 36 Stat. 1167.

[16] R. S. §§ 751–753 (1875) were at that time included as §§ 451–453 of Title 28 of the United States Code.

[17] See note 4, *supra*.

[18] H. R. Rep. No. 2646, 79th Cong., 2d Sess., p. A169; H. R. Rep. No. 308, 80th Cong., 1st Sess., pp. A177–178.

thority of courts as well as of individual justices and judges, was now provided in a single sentence which ostensibly imposed upon all the same jurisdictional limitation previously imposed only as to the Great Writ's issuance by individual judges.

Since from its first usage the limiting phrase had always been a qualification of the authority of individual judges to issue the Great Writ, we see no reason to read into the new codification a change of meaning specifically disclaimed by the Revisor. It is our conclusion, therefore, that the territorial limitation refers solely to issuance of the Great Writ with which the bulk of the section is concerned.

We feel that there is no indication that there is required today a more restricted view of the writ *habeas corpus ad prosequendum* than was necessary in 1807 when Chief Justice Marshall considered it. Cases reported from at least three Circuit Courts of Appeals, involving extraterritorial writs *ad prosequendum* issued both before and after the 1948 revision, *Taylor* v. *United States*, 238 F. 2d 259 (C. A. D. C. Cir.); *United States ex rel. Moses* v. *Kipp*, 232 F. 2d 147 (C. A. 7th Cir.); *Hill* v. *United States*, 186 F. 2d 669 (C. A. 10th Cir.); and perhaps four, cf. *Vanover* v. *Cox*, 136 F. 2d 442 (C. A. 8th Cir.), indicate as an accepted, or at least there unchallenged [19] interpretation of the statutes, that the writ suffers no geographical limitations in its use.

Moreover, this construction appears neither strained nor anomalous. Much was borrowed from our English

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[19] We are not unmindful of the terse Third Circuit dictum to the contrary in *Yodock* v. *United States*, 196 F. 2d 1018, and the divergent view of at least two District Courts. However, *Phillips* v. *Hiatt*, 83 F. Supp. 935, considered § 2241 as derived solely from R. S. § 752 (1875); and *In the Matter of Karol Van Collins*, 160 F. Supp. 165, relied, without distinction, upon *Ahrens* v. *Clark*, 335 U. S. 188, which dealt only with the Great Writ.

brethren. Although our own practice has limited the jurisdiction of courts and justices to issue the Great Writ, we have never abandoned the English system as to the *ad prosequendum* writ. Cf. 1 Chitty's Criminal Law 132 (1847), and 4 Bacon's Abridgment 566 (1856) for discussion of similar process. After almost two hundred years, we cannot now say it has been abandoned by a Congress which expressly said it intended to make no substantive changes. The more strongly are we led to this construction by recognition of the continually increasing importance assigned to authorizing extraterritorial process where patently desirable. Cf. Fed. Rules Crim. Proc., 4 (c)(2) and 17 (e)(1). And it is the more so here where an accommodation is so important between the federal and state authorities. *Hebert* v. *Louisiana*, 272 U. S. 312, 315–316 (1926). That comity is necessary between sovereignties in the administration of criminal justice in our federal-state system is given full recognition by affording through the use of the writ both respect and courtesy to the laws of the respective jurisdictions.[20]

Viewed in light of this history, petitioner's reliance upon cases dealing solely with territorial limitations upon issuance of the Great Writ and the criminal process authorized by 28 U. S. C. § 1651(a), unrelated to habeas corpus, is misplaced. *Ahrens* v. *Clark*, 335 U. S. 188 (1948), is clearly inapposite as is also *United States* v. *Hayman*, 342 U. S. 205 (1952), in which habeas corpus was not even involved.[21] To the extent that lower court decisions have relied upon a contrary construction of § 2241, we disapprove of their conclusions.[22]

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[20] In view of the cooperation extended by the New York authorities in honoring the writ, it is unnecessary to decide what would be the effect of a similar writ absent such cooperation.

[21] That case, as well as *Price* v. *Johnston*, 334 U. S. 266, dealt with process *in the nature of habeas corpus*, the authority for which was not derived from the *habeas corpus* statutes.

[22] See note 19, *supra*.

Even were we to have agreed with petitioner's argument, we would nonetheless be constrained to recognize that, within the modern attitude adopted in *Ex parte Endo*, 323 U. S. 283 (1944), rigid formulae, even as to the issuance of the Great Writ, may be tempered by factual considerations requiring the decision that its "objective may be in no way impaired or defeated by the removal of the prisoner from the territorial jurisdiction of the District Court" after the suit is begun. At p. 307. Such facts are present here. Petitioner Carbo filed an appearance bond, and submitted himself to the jurisdiction of the District Court by his personal appearance and plea of not guilty upon arraignment. Permission for his return to New York before trial was granted only upon his promise to, and the condition that, he return. Implicit in his request for the order of return to New York was his consent to the obligation imposed upon his custodians to return him to California promptly. The second writ of *habeas corpus ad prosequendum*, the only writ here involved, served only as assurance to petitioner and to the court that he would not suffer default in the obligation of his bail. Just as the mere subsequent removal of the prisoner in *Endo* failed to render that application beyond the court's power to consider, so too here, in a similar vein, we cannot say that these factors have fastened onto petitioner so unsecure a leash as to suffer his escape from the jurisdiction of the California court. We must, therefore, in any event, affirm on these facts.

Affirmed.

MR. JUSTICE WHITTAKER, believing that, on the peculiar facts here involved, the writ, though denominated "Habeas Corpus Ad Prosequendum," had the effect of and properly should be regarded as a subpoena issued under Paragraph (a) and properly served under Paragraph (e)(1) of Rule 17 of Federal Rules of Criminal Procedure, concurs in the result of the Court's opinion.

SUPREME COURT OF THE UNITED STATES

No. 72.—October Term, 1960.

Paul John Carbo, Petitioner, v. United States.	On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[January 9, 1961.]

Mr. Chief Justice Warren, with whom Mr. Justice Black joins, dissenting.

I cannot agree with the decision of the Court. We have said that "apart from specific exceptions created by Congress the jurisdiction of the district courts is territorial," *Ahrens* v. *Clark*, 335 U. S. 188, 190, and that as a general rule "a United States district court cannot issue process beyond the limits of the district." *Georgia* v. *Pennsylvania R. Co.*, 324 U. S. 439, 467–468. These principles were applied to writs of *habeas corpus ad subjiciendum* in *Ahrens* v. *Clark*, *supra*, where we held that the words "within their respective jurisdictions" as used in 28 U. S. C. § 2241 created a territorial limitation upon the *habeas corpus* jurisdiction of federal judges and courts. Today we are departing from *Ahrens* and the principles on which our decision in that case rested, for the Court holds that the restrictive language of § 2241 is inapplicable to writs of *habeas corpus ad prosequendum*. I can see no justification for these variant interpretations of the same language in the same statute.

We are not helped by the tortured history of § 2241 and its antecedents, since the legislative material relied on by the Court is, to say the least, ambiguous,[1] and could

[1] Chief Justice Taft, speaking for the Court in *Ponzi* v. *Fessenden*, 258 U. S. 254, construed § 753 of the Revised Statutes, one of the enactments relied upon by the Court, as imposing a territorial limita-

be used to support inferences diametrically opposed to those drawn by the Court. For example, the fact that the first statutory reference to the writ of *habeas corpus ad prosequendum* does not appear until the enactment of § 2241 reasonably implies that none of the prior statutory history is relevant insofar as that writ is concerned, and that in codifying a unified *habeas corpus* statute in 1948, Congress intended the restrictive language of the first paragraph of § 2241 to apply to all of the writs thereafter enumerated, among which are both the writ *ad subjiciendum* and the writ *ad prosequendum*.

Although the specific question presented by this case is a matter of first impression for us, the Court concludes that, since three, and perhaps four, Circuit Courts of Appeals have upheld the issuance of extraterritorial writs *ad prosequendum*, its interpretation of the statute has become an "accepted" one. But at the same time, the Court recognizes that there are other cases in which lower courts have "relied upon a contrary construction of § 2241." In each of these cases, the District Court overruled a defendant's request for a speedy trial by holding that since its orders could not "run beyond its territorial jurisdiction," it had no power to issue a writ *ad prosequendum* to bring to trial a defendant who was incarcerated outside of its district. *In the Matter of Van Collins*, 160 F. Supp. 165, 167 (D. C. Me.); *Phillips* v. *Hiatt*, 83 F. Supp. 935, 938 (D. C. Del.). Cf. *Edgerly* v. *Kennelly*, 215 F. 2d 420 (C. A. 7th Cir.); *Yodock* v. *United States*, 196 F. 2d 1018 (C. A. 3d Cir.). In view of these

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tion upon the District Court's power to issue a writ of *habeas corpus ad prosequendum*. He said:

"Under statutes permitting it, he [the prisoner] might have been taken under the writ of habeas corpus to give evidence in a federal court, or to be tried there *if in the same district*' § 753, Rev. Stats. . . ." *Id.*, at 261. (Emphasis added.)

cases, it can hardly be said that the Court's interpretation has become a generally "accepted" one.

The court below justified the District Court's action not upon § 2241, but rather upon the all writs statute, 28 U. S. C. § 1651. This Court refrains from relying on that section, as, indeed, it should, since the general provisions of § 1651 should not be read as expanding the jurisdictional limitations created by Congress with regard to a specific writ.[2] See *Price* v. *Johnston*, 334 U. S. 266, 279; *Adams* v. *McCann*, 317 U. S. 269, 272–273.

I do not say that the federal courts should not have the power to issue extraterritorial writs *ad prosequendum*. There are persuasive reasons for conferring such authority upon the courts, and Congress is perfectly free to do so. However, if the jurisdiction of the federal courts is to be expanded, and if the traditional territorial limitation is to be abandoned, then Congress should specifically so indicate.[3] But Congress has not done so, and until it

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[2] The lower court's reliance upon *United States* v. *Hayman*, 342 U. S. 205, is misplaced. There the Court upheld the issuance of an extraterritorial writ in the nature of *habeas corpus*, saying that the authority to issue the writ under § 1651 was necessarily inferred from the provisions of 28 U. S. C. § 2255. This case does not involve § 2255; nor does it involve any other statute which could be read as conferring extraterritorial authority upon the federal courts.

[3] In those few instances when Congress intended to extend the territorial jurisdiction of the federal courts it has specifically and unambiguously indicated that intent. S. Rules 4 (c) (2) and 17 (e) (1), Fed. Rules Crim. Proc., which read:

"Rule 4. Warrant or Summons Upon Complaint:

"(c) Execution or Service; and Return.

"(2) Territorial Limits. "The warrant may be executed or the summons may be served at any place within the jurisdiction of the United States." [*Footnote 3 continued on p. 4.*]

does, we should not tamper with the present statutory scheme, except by following the customary procedure of adopting a special rule and submitting it to Congress for approval. Cf. Rules 4 (c)(2), 17 (e)(1), Fed. Rules Crim. Proc.

Finally, I must add a few words concerning the Court's dictum that, regardless of the interpretation placed upon § 2241, the California District Court had jurisdiction to issue the writ because the petitioner had previously appeared in that court, had entered a plea of not guilty, and had been permitted to return to New York to obtain counsel on condition that he would come back to California for trial. It is said that by virtue of this appearance, the District Court had "fastened . . . a leash" on the petitioner, and that this "leash" supported the issuance of the writ *ad prosequendum*. However, the Court ignores the fact that petitioner's initial appearance in California was also obtained by means of a writ of *habeas corpus ad prosequendum* addressed to the authorities of the New York City Prison. It ill behooves the Court to attempt to justify the issuance of an unauthorized writ of *habeas corpus* by relying upon jurisdiction that was acquired by an equally unauthorized writ.[4] This theory introduces an unwise and judicially engrafted bootstrap exception to § 2241. In my opinion, the "leash" relied upon by the Court is in reality no more than a rope of sand.

"Rule 17. Subpoena.

"(e) Place of Service.

"(1) In United States. A subpoena requiring the attendance of a witness at a hearing or trial may be served at any place within the United States."

[4] The Court's reliance upon *Ex parte Endo*, 323 U. S. 283, is misplaced, because the District Court's initial jurisdiction in that case was unquestionably proper in all respects.